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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 1150.

JOSIAH MORRIS, Appellant,

vs.

JAMES N. GILMER, Appellee.

—BRIEF AND ARGUMENT OF—

HENRY C. TOMPKINS,
ALEXANDER T. LONDON,
for Appellant.

SAMUEL F. RICE,
DANIEL S. TROY,
of Counsel.

START OF ROLL

In Supreme Court of the United States,

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JOSIAH MORRIS, Appellant,

vs.

JAMES N. GILMER, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

Brief and Argument of Samuel F. Rice, Daniel S. Troy, Henry C. Tompkins, and Alexander T. London, for Appellant.

Statement of Facts.

This was a bill filed by the appellee, J. N. Gilmer, on the 20th of September, 1886, against the appellant, Josiah Morris, and F. M. Billing, to compel the transfer of sixty shares of the capital stock of the Elyton Land Company, a corporation under the laws of Alabama, which stock appellee alleges he had pledged with appellant, and to compel appellant to account to him for the dividends thereon.

It is alleged that appellee was, at the time of the filing of the bill, a citizen of the State of Tennessee, and the jurisdiction of the circuit court rests on that allegation alone.

The facts alleged and proved are substantially as follows: In the year 1870 the South and North Alabama Railroad was being extended northward from the city of Montgomery, Ala., towards Decatur in the same State and would cross the Alabama and Chattanooga Railroad. The officers in

charge of the two lines of railroad were satisfied that a large town would be built at the point of intersection, where the city of Birmingham is now located, and for the purpose of securing the lands at this point, they with others met at Chattanooga, Tennessee, and on the 25th of May of that year the agreement attached as an exhibit to the deposition of appellant [Record, p. 246] was entered into. This agreement will be referred to as the Chattanooga agreement. Neither appellant nor appellee were present at the time this agreement was entered into, though their names are signed thereto, and, so far as the evidence discloses, neither of them knew of the agreement until some time afterwards. John C. Stanton, representing the A. & C. R. R. Co., in bad faith, as it is claimed, secured options to buy the lands for himself, but failing to pay the purchase-money notes at maturity, John T. Milner, who represented the other railroad company, came to appellant, told him of the circumstances, and thereupon appellant paid the purchase-money amounting to one hundred thousand dollars and took titles for the lands in his own name. This was in the summer or fall of 1870.

For a long time prior to and ever since 1870 appellant has been the senior and principal partner in the banking house of Josiah Morris & Co. hereinafter spoken of, and said firm has been, during this time, engaged in the banking business in the city of Montgomery, and from 1872 until 1883, appellee, and his firms, and his father, F. M. Gilmer, Jr., were doing business with this banking house.

On the 8th day of December, 1870, a declaration signed by appellant, appellee and others, was filed in the office of the judge of probate of Jefferson county, where the lands were located, under the general incorporation laws of Alabama, and thereby they became incorporated under the name of the Elyton Land Company with a capital stock of $200,000. Record, p. 198.

The whole of this capital stock was paid for by ap-

pellant by the conveyance to the corporation of the lands which he had purchased as above stated.

After the organization of the company certificates were issued in the names of the several parties who signed the declaration including appellee, but these certificates in the names of persons who, like appellee, paid nothing for the stock, were all delivered to appellant, and transfers in blank were endorsed thereon by the several parties. There was issued in the name of appellee a certificate for 120 shares, but this certificate was delivered to appellant by the company and immediately thereafter endorsed in blank by appellee, and was never in the custody or control of appellee or his father. The certificates issued to Bolling Hall, H. M. Caldwell and others, were in like manner delivered to appellant and endorsed by them respectively in blank, and were held by appellant under agreements similar in terms to that with appellee's father. These other parties all paid the amounts they agreed to pay for the stock, and, upon such payments, appellant delivered to them the certificates issued in their names.

Deposition of J. Morris, Record, p. 116.

The original agreement in regard to this 120 shares of stock, and in fact, all of the transactions in reference thereto were had between appellant and F. M. Gilmer, Jr., father of appellee. Appellant and F. M. Gilmer, Jr., had been intimate friends for a number of years. F. M. Gilmer, Jr., was at this time President of the South and North Alabama R. R. Co., and was then, and continued to be until after 1884, insolvent, and in 1878 he was discharged in bankruptcy.

The South and North Alabama R. R. Co. had received financial aid from the State of Alabama, and there was in 1870 and for some years thereafter, a statute in force in the State which prohibited the officers and directors of all railroads companies which had received aid from the State from engaging in speculations in lands along the lines of their respective roads.

F. M. Gilmer, who is shown, by all the evidence, to

have made the only agreement ever made, testifies that owing to his insolvency and his official connection with the South and North Alabama R. R. Co., he requested appellant to permit his son, appellee, to have the privilege of taking the 120 shares stock for his own use, and thereupon appellant agreed to pay for the stock and carry it for appellee until he could pay for it.

Dep. F. M. Gilmer, Jr., Record, p. 179.

John T. Milner, who was, at the times stated, the Superintendent of the S. & N. Ala. R. R. was also interested in the stock of the Elyton Land Company, but, by reason of his official connection with the railroad company, his stock was taken in the name of H. M. Caldwell, whose name appears in the declaration of incorporation.

Appellant testifies that the agreement in regard to the 120 shares of stock was made solely for the benefit of F. M. Gilmer, Jr., who was his, appellant's, friend, and whom he desired to aid, and the declaration was signed by appellee, and the certificate was issued in his name solely, because of F. M. Gilmer's connection with the railroad company and to protect it from his, F. M. Gilmer's creditors. Appellant further says he did agree to let F. M. Gilmer have the stock whenever he paid him the cost of it $6,000, with the interest thereon.

Dep. Josiah Morris, Record, pp. 118, 119.

Appellant denies that he ever made any agreement or had any understanding with appellee or for his use or benefit, and insists that in all the transactions appellee was a mere figure-head representing his father.

Neither appellee nor his father ever gave to appellant any note or other obligation to pay for or take the stock, nor were either of them ever charged with the price [$6,000.00] nor have either of them ever paid therefor.

Dep. Josiah Morris, Record, pp. 120, 121.

Dep. J. M. Gilmer, Record, p. 100.

F. M. Gilmer, Jr., was indebted to appellant's banking house in 1870 more than $3,500 and continued in their debt,

in an amount greater than that sum until he was discharged in bankruptcy in 1878 as stated.

On the 30th day of December, 1871, appellant, with the knowledge, and, as appellee testifies, with his and his father's consent, sold 60 of the 120 shares to one Charles Linn for $6,000 and thereupon the certificate for the 120 shares was surrendered to the company, and in lieu thereof two certificates for 60 shares each were issued, one in the name of Linn and the other in the name of appellee, This last mentioned certificate was not, however, delivered to appellee, but was sent by the company to appellant, and thereupon appellee came to appellant's office and endorsed the certificate to appellant, who continued to hold it until he surrendered it to the company in 1875 and received in lieu thereof a certificate for 60 shares in his own name. This certificate for 60 shares was never in the custody or control of appellee or his father, but the stock stood on the books of the Elyton Land Company in appellee's name. From December 30th, 1871, until March 30th, 1875, there is no evidence that appellee ever spoke of, or alluded to this stock to appellant.

One Margaret Farley, prior to March, 1875, had recovered a judgment in the circuit court of Montgomery county against appellee, P. W. Donaldson and one J. M. Browder, who were the individuals who composed the firm of Gilmer, Browder & Co. hereinafter referred to. Execution issued on this judgment to Jefferson county, where the principal office of the Elyton Land Company was situated, and was there levied on the 60 shares of stock, then standing on the books of the company in the name of appellee. Under the statutes of Alabama in force at this time, shares in incorporated companies were subject to levy and sale under execution against the party, in whose name the stock stood on the books of the corporation. Code of 1876, § 2041.

Appellant, learning of the levy and ascertaining that the attorney for the plaintiffs in execution was his, appellant's, general counsel, he went to see him and complained of his

having caused the levy to be made on this stock, which he, appellant, claimed as his own, and desired to know whether he, appellant, would be compelled to pay the execution. The attorney then advised him that, as the stock was standing on the books of the company in the name of J. N. Gilmer and neither he nor his client knew of appellant's interest therein, it was subject to the execution under the statute and he paid the execution amounting to $233.60, and took a transfer of the judgment on the 12th day of May, 1875. In this interview with his counsel in regard to the levy on the stock, the counsel advised him to sell the stock and pay Gilmer's debt, but appellant declined on the ground that this stock belonged to him, appellant, and thereupon counsel advised him to have the stock transferred on the books of the company, which he thereupon did.

Dep. D. S. Troy, Record, pp. 150, 151.

Dep. Josiah Morris, Record, p. 117.

On the 30th day of March, 1875, appellant surrendered the certificate for 60 shares in the name of appellee to the company and, on that day, a certificate for the 60 shares was issued to appellant in his own name, and, since this time, appellee's name has not appeared on the books of the company.

There was in existence at this time, (March 30th, 1875,) the firm of Gilmer & Donaldson, composed of two of the defendants in the execution, viz., appellee and P. W. Donaldson, which firm had an account with the banking house of Josiah Morris & Co., and on the 12th day of July, 1875, appellant caused the amount he had so paid to be charged on the books of Josiah Morris & Co. to Gilmer and Donaldson. Appellant testifies and insists that the evidence shows that there was no agreement of any kind made with appellee at this time in reference to this stock, and that he simply paid off this execution to prevent the sale of his stock.

Appellee testifies, that, upon being informed of the levy, he went to see appellant, about March 30th, 1875, when the following agreement was made. We give his own words :

> "I called on Mr. Morris and stated that my father said he wished to see me in reference to the payment of this judgment, and that he had agreed with my father to pay this judgment and have the stock transferred to him upon the books of the Elyton Land Company and to hold such judgment and the stock as a collateral security for that indebtedness, and any other indebtedness I might be due him."
>
> Dep. J. N. Gilmer, Record, p. 90.

In answer to a question by appellee's counsel, as to whether anything was said by appellant in 1875 in reference to the stock being security for any future indebtedness of J. N. Gilmer, F. M. Gilmer, Jr. testifies as follows. We give his words:

> "He was to hold the stock for that advance and for all future liabilities of the said J. N. Gilmer.
>
> Q. To whom?
>
> A. To Josiah Morris & Co., or parties advancing, and for all the firms with which he might be connected."
>
> Dep. F. M. Gilmer, Jr., Record, p. 78.

As to the balance due on the purchase of the stock they are both silent.

On March 30th, 1875, appellee was indebted to Josiah Morris & Co., outside of any liability for the stock, $3,882.27 with interest $51.76, amounting in all to $3,934.03.

Report of Special Master, Schedule A., Record, p. 383.

At this time the sixty shares of stock was worth not more than twenty-four hundred dollars ($2400.)

Dep. D. S. Troy, Record, p. 150.

Dep. J. F. Whitfield, Record, p. 160.

Appellee insists that these 60 shares were, after this time, and pursuant to the alleged agreement, used as a basis of credit by him and his various firms and constituted a continuing pledge for the liabilities of himself and his firms up to the year 1883, when he and they ceased to do business with appellant's banking house of Josiah

Morris & Co., and this alleged pledge is the basis of this suit. The uncontradicted evidence of both appellant, appellee and F. M. Gilmer, Jr., shows that the 60 shares of stock were never spoken of, or alluded to by any of the parties from the 30th day of March, 1875, until May, 1884, when appellee demanded a transfer of the stock to himself as hereinafter stated.

Dep. Josiah Morris, Record, pp. 117, 119.

Dep. J. N. Gilmer, Record, pp. 108, 109.

Dep. F. M. Gilmer, Jr., Record, p. 82.

During the whole of the period from 1870 to 1884 the relations of appellant with appellee had been friendly and they met each other almost daily. The evidence shows that the firm of Gilmer, Browder & Co., before referred to, and composed of appellee, P. W. Donaldson and J. N. Browder, and which was the first firm in which appellee was interested, began business with Josiah Morris & Co. on the 14th June, 1872, and that this business was continued until October 30th, 1874, when the account was closed and there was a balance against the firm of $29.90. This firm was also indebted to Josiah Morris & Co. on January 27th, 1875, for the balance on a note for $4,000 given for money loaned them and not included in the account referred to, in the sum of $3,882.27, which amount has never been paid.

Schedule A. to Report Special Master, Record, p. 383.

This note was secured by a mortgage of personal property from which nothing was ever realized.

This balance was charged off to profit and loss by Josiah Morris & Co. March 5th, 1884.

Dep. Josiah Morris, Record, pp. 129, 135.

The balance due by Gilmer, Browder & Co. on the account [$29.90] was charged by Josiah Morris & Co. to the firm of Gilmer & Donaldson, composed of appellee and P. W. Donaldson, November 1st, 1876, which was after Donaldson's death.

The firm of Gilmer & Donaldson was formed early in 1875, and on March 26th of that year they began business

with Josiah Morris & Co., which continued until Donaldson's death in 1876. This account, when closed in February, 1877, showed a balance against the firm of $2,323.03, and, with the exception of the amount realized from the insurance stock [$975] as hereinafter stated, this balance has never been paid, but was charged off to profit and loss May 11th, 1880, or prior thereto.

Dep. Josiah Morris, Record, p. 133.

During the existence of the firm of Gilmer & Donaldson and as a basis of credit, they deposited with Josiah Morris & Co. certain insurance stock, and the company issuing this stock going into liquidation, nothing was realized until March 11th, 1880, when Morris & Co. received, on the distribution of the insurance company's assets the $975 referred to, which they placed to the credit of the firm. On March 11th, 1880, exclusive of interest, and the original balance on the stock, appellee owed Josiah Morris & Co., $5969.81.

See Schedule A. to Report Special Master, Record, p. 383.

Appellee, under the name of J. N. Gilmer & Co., opened an account with Josiah Morris & Co. in October, 1876, and these dealings resulted in a balance against him on May 30th, 1879, of $222.43, and after repeated demands and constant dunning, this balance was reduced to $52.33 and was closed by a note on May 31st, 1883, which appellee paid on October 3rd, 1883.

The evidence is undisputed that from March 30th, 1875, the stock in controversy was never at any time alluded to by any of the parties until the month of May, 1884, when appellee demanded a surrender of the stock by appellant, which he refused, and appellant then denied that he had, or had ever had, any stock belonging to appellee, or that appellee had ever owned any stock in the Elyton Land Company.

The undisputed evidence shows that F. M. Gilmer, father of complainant, owed Josiah Morris & Co., in October, 1874, $5,742, in April, 1875, $3,634, in April, 1876,

$5,940.11, and when account was closed in July, 1876, $3,734.41 outside of any transactions in regard to this stock.

The evidence also shows that F. M. Gilmer, Jr., and appellant were in 1870 and 1871, and had been for a long time prior thereto, intimate and on very friendly terms, and this friendly relation continued until 1884, and while the relations between appellant and appellee during this time were friendly, they were by no means intimate.

The undisputed evidence also shows that from 1870 until 1887, when appellee was examined as a witness in this cause, he was at all times hard up and insolvent.

The balance against F. M. Gilmer, Jr. and the several firms mentioned have never been paid.

The certificate for the 60 shares of stock, transferred to appellant on March 30th, 1875, was held by him until February, 1881, when he sold three hundred shares of his stock at $100 a share and to deliver it he surrendered this certificate, with others, aggregating 410 shares to the company, and in lieu thereof caused to be issued certificates for 100 shares each to James T. Woodward, William Woodward, and C. C. Baldwin, and a certificate for 110 shares was returned to him. Appellant testified and told appellee, when he made demand for the stock in 1884, that he had sold the sixty shares to Woodward and Baldwin.

Dep. J. N. Gilmer. Ans. to 5th Interrog., Record, p. 181.

Dep. Josiah Morris, Record, p. 207.

And this sale was found as a matter of fact by the Supreme Court of Alabama, and is expressly alleged in the original bill filed in the State court.

Opinion of Mr. Justice Somerville, Record, p. 27.

Original Bill, Par. 5, Record, p. 162.

At the time of this sale, February, 1881, appellee was indebted to appellant for principal money $5,969.81, upon which interest had accrued amounting to $2,022.33, a total of $7,992.14.

Schedule A. to Report of Special Master Record, p. 383.

The stock declined in value after December, 1871, and was worth at the times hereinafter stated the following

prices per share of $100 each: In 1875, $40; in 1877, $25; in 1878, $18 to $24; in March, 1879, $25; in April, 1879, $33; in February, 1880, $40. In 1881 it appreciated in value to $100; in 1882 to $150 to $200; in 1885, $700. Early in 1886, $1,000; in the winter of 1886–7, to $4,000 per share.

The stock commenced to pay dividends in February, 1883, and there were declared and paid in each year thereafter in cash and stock and bonds as dividends on sixty shares of the stock, the following:

In 1883, $6,300 cash.

In 1884, $5,400 cash.

In 1885, $2,700 cash.

In 1886, $19,800 cash.

In 1887, $12,300 cash, and in this last year there was also declared and paid as dividends in addition to the cash dividends, bonds of the par value of $75,000 and stocks of the par value of $51,000, amounting in all to $172,500 up to the time of holding the reference herein.

Schedule D. to Report of Special Master, Record, p. 385.

In May, 1884, apellee went to the office of appellant and demanded a transfer of the sixty shares of stock, or to be allowed to redeem them, and apellant thereupon denied that he had then, or ever had or held, any stock for appellee, and informed him that he, appellant, had sold in 1881 the sixty shares which he had agreed to let his, appellee's father, have whenever he paid for it. Thereafter on the 7th day of July, 1884, appellee filed a bill in the Chancery Court of Montgomery county, Alabama, a court of general equity jurisdiction against appellant and F. M. Billing to compel the transfer of these sixty shares of stock and an account of the dividends and profits thereon.

Record, p. 161.

This bill contains the following allegations:

> "That on the 30th day of March, A. D. 1875, and from the 30th day of December, A. D. 1871, orator owned, and was possessed of sixty shares of the capital stock of the Elyton Land Company, a corporation under the laws of

Alabama, and for which he held a certificate of stock issued by said company to him, dated December 30th, 1871.

2. That previous to, and on the 30th March, A. D. 1875, the firm of Gilmer & Donaldson, which firm was composed of your orator and P. W. Donaldson, was indebted to Josiah Morris & Co., a banking firm of the city of Montgomery, in about the sum of $3,000.00, and on said 30th day of March, A. D. 1875, orator transferred and assigned to Josiah Morris, who was the leading member of said firm of Josiah Morris & Co., the said sixty shares of the capital stock of said Elyton Land Company, standing in the name of and belonging to orator as above stated; said transfer was substantially in the words and figures following:

"For value received I hereby sell, transfer and assign to Josiah Morris the shares within mentioned, and authorize Josiah Morris to make the necessary transfer on the books of the company. "J. N. GILMER.

"In the presence of }
"F. M. Gilmer, Jr. }

"March 30th, 1875;" and said transfer was written upon the said certificate of shares.

3. That orator's said firm was of small means, and its business was that of warehousemen and commission merchants in the city of Montgomery; and that its banking business was done with said firm of Josiah Morris & Co., which was also doing business as bankers in said city. That orator's said firm was unable to pay said indebtedness to said firm of Josiah Morris & Co., in cash, and, without paying or securing the same to the satisfaction of the said firm, would have been wholly unable to do business further. That before, and on said 30th day of March, A. D. 1875, it was agreed and understood between orator and said Josiah Morris, in behalf of, and for said firm of Josiah Morris & Co., that orator should transfer and assign said stock in said Elyton

> Land Company to him, in trust, and as collateral security for the payment of the said debt of orator's said firm to the said Josiah Morris & Co. And orator avers that said transfer to said Josiah Morris, although absolute in form, was made in pursuance of, and to carry out said agreement, and was intended to be, and was made and received as collateral security for said indebtedness of orator's said firm to said Josiah Morris & Co.; and that neither said Josiah Morris, nor said Josiah Morris & Co., ever paid to orator, or to any other person at his request, anything for said transfer or for said shares."
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> Record, pp. 161 and 162.

The bill then alleges in substance, in paragraph 4: That on the same day on which the transfer was made to Morris, Morris surrendered the certificate so transferred and received a certificate for sixty shares of stock, dated that day, in his own name; that Morris had never sold or disposed of the stock, or if he had done so, it was without any notice or knowledge of orator. That the dividends on the stock, received by Morris, were more than sufficient to pay the debts due with interest, and in case orator was mistaken in this he offered to pay what might be due.

Paragraph 5 alleges in substance, that within three months before the filing of the bill, orator had demanded an accounting and settlement of Morris for the stock and dividends, which Morris refused, that Morris then claimed the stock as his own and claimed that he had sold it a long time before this demand to Baldwin and others. That, this was the first intimation orator ever had that Morris claimed the stock as his own, or denied the trust.

Paragraph 6 shows who were the members of the firm of Josiah Morris & Co., and alleges that the debts due them by orator's firm had never been paid except by dividends on the stock in question; but sets up that Donaldson had conveyed, by way of mortgage certain real estate, from which Morris & Co. had realized enough to pay one-half of the debt.

Alabama, and for which he held a certificate of stock issued by said company to him, dated December 30th, 1871.

2. That previous to, and on the 30th March, A. D. 1875, the firm of Gilmer & Donaldson, which firm was composed of your orator and P. W. Donaldson, was indebted to Josiah Morris & Co., a banking firm of the city of Montgomery, in about the sum of $3,000.00, and on said 30th day of March, A. D. 1875, orator transferred and assigned to Josiah Morris, who was the leading member of said firm of Josiah Morris & Co., the said sixty shares of the capital stock of said Elyton Land Company, standing in the name of and belonging to orator as above stated; said transfer was substantially in the words and figures following:

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> Land Company to him, in trust, and as collateral security for the payment of the said debt of orator's said firm to the said Josiah Morris & Co. And orator avers that said transfer to said Josiah Morris, although absolute in form, was made in pursuance of, and to carry out said agreement, and was intended to be, and was made and received as collateral security for said indebtedness of orator's said firm to said Josiah Morris & Co.; and that neither said Josiah Morris, nor said Josiah Morris & Co., ever paid to orator, or to any other person at his request, anything for said transfer or for said shares."
>
> Record, pp. 161 and 162.

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Paragraph 5 alleges in substance, that within three months before the filing of the bill, orator had demanded an accounting and settlement of Morris for the stock and dividends, which Morris refused, that Morris then claimed the stock as his own and claimed that he had sold it a long time before this demand to Baldwin and others. That, this was the first intimation orator ever had that Morris claimed the stock as his own, or denied the trust.

Paragraph 6 shows who were the members of the firm of Josiah Morris & Co., and alleges that the debts due them by orator's firm had never been paid except by dividends on the stock in question; but sets up that Donaldson had conveyed, by way of mortgage certain real estate, from which Morris & Co. had realized enough to pay one-half of the debt.

Paragraph 7 alleges the death of Donaldson on the 6th of February, 1876.

The prayer is, that it might be decreed that the transfer of the stock was made in trust and as collateral security for the payment of the debt alleged, that an account of the debt and dividends might be taken, and that Josiah Morris might be required upon payment of the debt to transfer the sixty shares of stock and to pay over any dividends received by him in excess of the debt, and also prays general relief. Record, p. 165.

The defendant, Josiah Morris, on August 16th, 1884, filed a separate answer, in which, while admitting that the certificate for sixty shares issued in the name of J. N. Gilmer, he avers that this certificate was delivered to him by the company, was transferred by J. N. Gilmer, and remained in his (Morris') possession until March 30th, 1875, when it was surrendered by him to the company, and a new certificate in place thereof was issued to him by the company, in his own name, which he retained until April 23d, 1881, when he sold the stock for a valuable consideration and surrendered the certificate to the company. Morris then denies that J. N. Gilmer "ever had any real interest in said stock, or possession of said certificate, or ever paid a dollar therefor." The defendant then set up that the failure to have the certificate of December, 1871, issued in his own name was negligence, to which his attention was called in 1875 by the levy of an execution against J. N. Gilmer and others. He then "denies that the stock was transferred to him for the purpose of securing any indebtedness to him or the firm of Josiah Morris & Co. by the firm of Gilmer & Donaldson, or either the complainant, or said Donaldson, or that they, or either of them, had any connection whatever with the consideration upon which said transfer was based." That Gilmer & Donaldson did not exist until 1875, and on the 30th of March of that year this firm did not owe Josiah Morris & Co. over fifty dollars, which was created on the 26th March, 1875. The answer

then denies that J. N. Gilmer ever called on the defendant for an account, admits the death of Donaldson in February, 1876, and that Gilmer & Donaldson had but limited means. Denies that Josiah Morris & Co. had any interest in the stock, and denies all the other allegations of the bill not specially answered. The answer concludes as follows:

> "11. This respondent, as a defense to the matters alleged in said bill, saith, that the said shares of stock had been his own absolute property against the complainant from the 30th of December, 1871, until the 23d of April, 1881, when he sold the same, and against the whole world, from the 30th of March, 1875, to the time of said sale, and avers that the claim set up in complainant's bill is barred by the statute of limitations.
>
> 12. And this respondent demurs to said bill because:
>
> (1.) The facts alleged show, that the demand is stale and barred by the statute of limitations.
>
> (2.) The complainant has an adequate remedy at law."
>
> Record, p. 165.

The defendant, F. M. Billing, filed a disclaimer.

Record, p. 165.

Appellee on the 7th of October, 1884, filed the following amendments to his bill marked 1, 2 and 3.

Amendment to Bill of complaint. Record, pp. 166, 167.

"1. Amend the first paragraph so that the same shall read as follows:

> "1. That on the organization of the Elyton Land Company, a corporation under the laws of Alabama, or soon thereafter, the privilege of taking one hundred and twenty shares of the capital stock of said company for the sum of $6,000, was offered by the managers and controllers of said company to one F. M. Gilmer, Jr., the father of orator, but that the said F. M. Gilmer, Jr., declined to take said stock, but asked and obtained the privilege for orator to do so, and that thereupon orator was allotted

said number of shares and a certificate therefor issued to him by said company; that Josiah Morris agreed to pay the said six thousand dollars to said company as required, for orator, and to hold, until other arrangements could be made, the said stock as a security for repayment, and that he received the certificate issued to orator for that purpose, and that he did pay to said company, from time to time, but at what dates orator does not know, the said six thousand dollars due by orator for the said stock.

2. Strike out the paragraph numbered two, and in lieu thereof insert the following:

2. That while said Morris so held said stock, and after he had paid all or a part of said six thousand dollars, to-wit, about the 30th March, A. D. 1871, the original certificate issued for said one hundred and twenty shares of said stock in said company was surrendered, and in lieu thereof two certificates, each for sixty shares of said stock; were issued in orator's name and delivered to said Morris; and orator, to make the security of said stock available to said Morris, made a transfer and assignment of each of said certificates to said Morris, which assignment was written, or partly written and partly printed, and was on the said certificates, and was in each case witnessed by orator's said father, F. M. Gilmer, Jr. That said assignments were in the usual and absolute forms printed upon certificates of stock issued by corporations; that about this time, or shortly thereafter, one Charles Linn proposed to accept sixty shares of said stock or one of said certificates, and to pay for the same the sum of six thousand dollars; that this proposition being communicated to orator, he consented thereto and directed said Morris to make the transaction with said Linn, and thereupon one of said certificates for sixty shares was delivered by said Morris to Linn, who paid him therefor the sum of six thousand dollars, the original cost of all said stock to

orator, less any interest due by orator to said Morris for the payments made by him on account thereof prior thereto. What amount of money is due to said Morris on this account orator has never been informed and does not know.

3. Strike out the paragraph numbered three, and insert in lieu thereof the following:

3. That the said stock undisposed of to the said Linn orator suffered to remain with, and in the possession of said Morris because, its value was chiefly prospective, and because orator had confidence that the said Morris would account for and surrender the same whenever orator might call upon him to do so and should pay to him, and to the firm of Josiah Morris & Co., of which said Morris was the leading member, all balances of money due to him and them by orator.

That after the transfer to said Linn orator did become and still is liable to said Morris and to said firm of Morris & Co. for various small sums of money, besides the balance due on account of interest to said Morris on account of the original purchase of said stock; that orator being a man of small means the stock in the hands of said Morris became and was a basis of credit for money."

The fourth paragraph of the bill was stricken out and in lieu thereof another paragraph numbered four was inserted in which orator offered to pay whatever might be due Morris or J. Morris & Co. on a settlement; denied that he had ever authorized Morris to sell the stock, or that he had any notice or knowledge of any claim that he had done so, or that Morris ever had made any actual or legal sale of the stock, and alleged that if the stock had been sold, Morris was bound to replace it and to account to him for all the dividends paid thereon. He then avers that no consideration was paid to or for him for a sale of the stock.

The fifth paragraph was amended in the last sentence so as to allege in substance, that the denial by Morris in 1884 was the first intimation or notice that appellee had that

Morris denied that he held the stock in trust, or claimed any interest in it "except by way of security for the balance due him on the original purchase" not repaid by the sale to Linn, and for other advances made by Morris and his firm to orator or for his account.

The sixth and seventh paragraphs were stricken out. The prayer was amended so as to pray that Morris might be decreed to transfer to orator sixty shares of the capital stock of the Elyton Land Company, and to account for the dividends on that number of shares, paid by the company since the transfer to Morris upon orator's paying to him all sums of money proper to be paid upon a just and fair accounting. That an account might be taken between the parties concerning the stock and dividends and the charges against the same due to Morris, and that Morris be decreed to pay to orator any balance which might be found to be due him, and in case a balance was found to be due Morris, that a sufficient amount of the stock be sold to pay this balance should orator fail to pay it within a given time to be fixed by the Court.

To the bill as amended the defendant Josiah Morris on March 13, 1885, filed an amended answer (Record p. 168) in which he alleged in substance that he bought and paid for a tract of land near Elyton in Jefferson county, Alabama, and afterwards the Elyton Land Company was organized and this real estate became its capital. That prior to the purchase, an arrangment had been made by Morris with certain other parties for the purchase of the land, but this agreement was not acted on, but after the company was organized the stock was distributed among certain persons selected by the company and Morris. That among others he, Morris, selected F. M. Gilmer, Jr., but did not select J. N. Gilmer. That F. M. Gilmer, Jr. informed him, that owing to his official relations with the South & North Alabama Railroad Company and to his embarrassed condition financially, he could not hold the stock and requested that the stock might be taken for him in the name of his son J. N. Gilmer,

which was accordingly done. That F. M. Gilmer, Jr., was selected on personal grounds, none of which applied to J. N. Gilmer. That he, Morris, took and paid for the stock for F. M. Gilmer and the use of the name of J. N. Gilmer was not to affect the transaction, and that J. N. Gilmer was ignorant of all these transactions.

The issue of the stock certificates for 120 shares in 1871, the sale of sixty shares to Linn in December 1871, and the issue of the certificates for sixty shares and the transfer of them to Morris are set out, and it is alleged that none of these certificates were ever in the possession of J. N. Gilmer; that he was a mere figure head, was not consulted in reference to them, and had nothing to do with them, except to sign the transfers. Morris then admits that the $6,000 paid for the stock was refunded by the sale to Linn in 1871, except the interest, but he alleged that at the time of the agreement in 1871, and thereafter F. M. Gilmer, Jr. was indebted to him, Morris, in large sums of money and the stock was to be held as security for this indebtedness, as well as the balance due on the purchase. That the transfer of the stock was made absolute, so that he (Morris) might exercise his discretion as to disposing of them, and that he held the stock until 1881, when he sold it for $100 a share. That between December 30th, 1871, and April 1881, the stock went down to the value of less than twenty dollars a share. That he (Morris) and F. M. Jr. and J. N. Gilmer lived in the same town, met almost daily, had many transactions, that both of the Gilmers were all of this time pressed for money and yet neither of them ever mentioned the stock, or claimed any interest in it. That after 1881 the stock rapidly appreciated in value, but was never mentioned by J. N. Gilmer to him until a short time before the filing of the bill. He then denies that F. M. Gilmer declined to take the stock or obtained the privilege for his son, or that he ever gave it to his son. That at no time he held the stock was it equal in value to the indebtedness due to him. The answer then sets up the bankruptcy and discharge of F. M. Gilmer by

the District Court of the United States as a bar to any claim to the stock by him, and concludes as follows:

"And respondent demurs to said bill because—

1. The facts show that the demand is stale.
2. That it is barred by the statute of limitations.
3. The complainant has an adequate remedy at law.
4. The bill as amended makes an entirely different case from that made by the original bill.
5. There is no tender alleged in the bill of the amount admitted to be due; and said amount is not brought into court, and respondent denies all the allegations not admitted by the answer or otherwise specifically answered." Record, p. 170.

On April 22d, 1885, the defendant, Morris, filed an amendment to his former answers, (Record, p. 170,) in which he denied that either J. N. or F. M. Gilmer, Jr., ever became the owners of the shares of stock sued for, or any of them; averred that he bought and paid for the shares with his own means; denied that he ever parted with the legal title to any of the 120 shares for which a certificate was issued in the name of J. N. Gilmer, until he sold sixty shares to Linn in 1871, and the remaining sixty shares to Woodward in 1881. Denies that there was ever any agreement or understanding express or implied between him and either of the Gilmers that the stock should become the property of either of them, or that his title should become divested until it was paid for, and avers, that in all negotiations between him and F. M. Gilmer, it was distinctly understood and agreed that the stock should remain his (Morris') property until it was paid for at $50 per share with interest on the price, $6,000, from the time the money was paid out for the same, and this agreement was continued as to the 60 shares which remained after the sale to Linn; that neither the 120 or 60 shares were ever in the custody, control or dominion of J. N. Gilmer, nor was the beneficial ownership ever vested in him. He then

avers, that if he is mistaken in the foregoing averments and denials, and J. N. Gilmer did become the owner of the 60 shares, that in March 30, 1875, he surrendered the certificate for 60 shares to the company, and caused a certificate to be issued in his own name therefor; that at this time J. N. Gilmer was largely indebted to Josiah Morris & Co., which amount he was bound to pay before demanding a reconveyance of the stock if he were entitled to a reconveyance. The answer then concludes as follows:

> "And it was the duty of the complainant, if entitled to a reconveyance of said stock, to demand such reconveyance within a reasonable time, to-wit: Within six years from the said 30th March, 1875, to this respondent; and respondent avers that said stock being speculative in its character became greatly depreciated in value, to-wit, of the value of less than $20 per share, and said complainant not only failed and neglected to request or demand a reconveyance of said stock to himself within a reasonable time as aforesaid, but said complainant abandoned all claim to said stock, and never set up any claim to the same or made any request or demand for the reconveyance thereof to himself, a long period, to-wit, until the filing of the original bill in this cause or about that time." Record, p. 172.

On April 7th, 1885, the defendant, Morris, made the following motion in open court under the rules of practice in the Chancery courts of Alabama:

> "The defendant moves the court to strike the amended bill from the docket because the cause of, as stated in said bill, is the substitution and introduction of a new cause of action, not included in the cause of action stated in the original bill." Record, p. 173.

And on April 29th, 1885, the chancellor disposed of this motion by the following decretal order:

> "This cause was submitted at the last term of the court, on the motion of defendant, Josiah Morris, to strike from the file the amendment

to the bill filed on October 7, 1884, and the further consideration of said motion is held for decree in vacation. And on consideration, it is ordered, adjudged, and decreed that the said motion be and the same is hereby overruled." Record, p. 287.

Depositions of J. N. Gilmer, F. M. Gilmer, Jr., and Josiah Morris and others, were taken. Under the rules of chancery practice in Alabama, upon the submission of a cause a note of the testimony relied on by the parties is made, and on the 22d of April this cause was submitted to the chancellor on the following note of testimony:

Complainant, being called, offers the following testimony, to-wit:

1st. Two depositions of J. N. Gilmer.
2d. Two depositions of F. M. Gilmer.
3d. Deposition of W. J. Milner.
4th. Transcript of declaration for incorporation, Probate Court of Jefferson county, of Elyton Land Company.

Defendant, being also called, offers the following testimony, to-wit:

1st. Deposition of Josiah Morris and exhibits thereto.
2d. Deposition of Jno. T. Milner.
3d. Agreement of counsel in reference to return by F. M. Gilmer, in bankruptcy, of his indebtedness to Morris. Record, p. 173.

The cause was fully argued on the submission and held up by the chancellor for decision in vacation, and on April 29th, 1885, he delivered the following opinion and rendered the following decree:

"J. N. GILMER, *vs.* JOSIAH MORRIS. } In Chancery at Montgomery, Ala. In vacation.

By a mortgage, the legal title passes to the mortgagee. This is not true of a verbal mortgage, which is but equitable, for in the case of Knox v. Wilson, in MSS., it is held that the mortgagor can claim his exemption of personal property against such a verbal encumbrance.

It is not disputed that a mortgagee in possession after the law day, holds adversely to the mortgagor, and that his

possession ripens into a title of realty after ten years, and of personalty after six years.

It is also conceded that a mortgagor in possession, does not hold adversely to the mortgagee, but by permission and in subordination to the title of the mortgagee, and therefore such a possession will not ripen until the expiration of twenty years.

Whenever the legal title and the possession are in the same person, the possession is adverse. This is the general rule, and probably there can be found no exception to it. I repeat, the legal title, accompanied by possession, whether of real or personal property, makes the possession adverse to all persons, and will be sufficiently so to destroy any lien or equity which is not asserted before the bar of limitations is complete.

Now the question to be determined, is—

1. Whether Josiah Morris has held the legal title and the possession of this stock for more than six years.

2. Whether J. N. Gilmer has asserted, or Mr. Morris has recognized any equity, or lien, upon them during the six years before the filing of this bill.

1. It is admitted that Morris has had, through himself, or his assignee, possession of the stock since 1875, and we are to consider only whether the legal title has been in him.

The general rule is, that the legal title does not pass to the pledgee of personal property, but instead of the legal title the possession and the right of possession passes to the pledgee. In such cases there is an exception to the general rule, that the holder of the legal title can sue for and recover the property. Here, the pledgor, holding the legal title can not recover, and the pledgee having but a lien, or equity, can retain possession. Possession is substituted for title by the exigencies and circumstances of the case. But there is an exception to this general rule, which is fully recognized. In Jones on Pledges, § 153, the learned author lays down fully the exception, and I have not found any authority which satisfies me that the doctrine set out by him is untenable.

If jewels, or clothing, or furniture, or other tangible personal property, is placed in the hands of the pledgee, he gets no title, but only the right to hold possession. This possession without title may not be sufficient to be regarded as adverse to the pledgor. I am of the opinion, that the weight of authority is against such possession being adverse, and that the pledgee can not successfully interpose the bar

of the statute of limitations against the pledgor as to such property so held. The language of said section 153, which I hereby adopt, is—"153. A transfer of the legal title is not inconsistent with the existence of a pledge. On the contrary, it is true that incorporal property, being incapable of manual delivery, can not generally be pledged without a written transfer of the title. Collateral securities, such as negotiable instruments, *stocks in incorporated companies*, and choses in action generally, are pledged in this mode." Such transfer of the title performs the office that the delivery of possession does in case of a pledge of corporal property. The transfer of the title, like the delivery of possession, constitutes the evidence of the pledgee's right of property in the thing pledged. In such case, although the pledgee receives the apparent legal title, the general property in the security remains in the pledgor. Whenever it appears by the terms of the contract, that the debtor has a legal right to the restoration of the security, on payment of the debt, he may be said to have the general property in it. This general property is nothing more than a legal right to the restoration of the thing pledged on payment of the debt. * * * *."

It will thus be seen that the pledgee of these stocks has had the legal title and the possession of them. Although not a mortgagee, his relations to the pledgor are the same as those of a mortgagee to the mortgagor, so far as *title* and *possession* go. The mortgagor has that same "general title" or "right to the restoration" of the property "on payment of the debt." I, therefore, conclude that the possession of Josiah Morris has been adverse to the rights of J. N. Gilmer.

2. I am not able to discover that Mr. Morris has so recognized the rights of Mr. Gilmer as to interrupt the running of the statute of limitations. The mere fact that he now in his testimony explains the transaction without any consent to recognize and act upon Mr. Gilmer's claim, is not such a recognition. In fact, if every day since 1875 he had given such an explanation, the effect would not have been to stop the running of the statute. His holding was always subject to Gilmer's right to redeem, and if he recognized the right to redeem all the time, until the expiration of six years, his possession continued to be adverse. A recognition of his right to redeem afterwards would revive that right if legally made.

The statute of limitations began to run as soon as the right to redeem existed. In case of a mortgage, the statute

begins to run in favor of the mortgagee in possession on the law day of the mortgage, because the right to redeem begins on that day, and the right to redeem by paying the debt in this cause began on the first day of the transaction. The statute of limitations, therefore, is a bar to the rights of the complainant in this cause.

I do not cite the authorities in this opinion. They have been collected with great industry by counsel, and the points have been ably presented. But I have announced my conclusion after a careful examination of the authorities cited.

There are several other questions in the cause which have been carefully examined, but I do not care to write any opinion upon them.

J. N. GILMER, vs. JOSIAH MORRIS. } In Chancery at Montgomery, Ala. In vacation.

This cause was submitted for decree at the last term of the court, and held for consideration in vacation on the pleadings and testimony as noted, and on consideration—It is ordered, adjudged, and decreed that complainant is not entitled to relief, and that this bill of complaint be and the same is hereby dismissed out of this court.

Let complainant pay the costs of this suit, for which execution may issue.

April 29, 1885.

JOHN A. FOSTER,
Chancellor."

Record, pp. 287, 288, 289.

From the decree thus rendered appellee appealed to the Supreme Court of Alabama, and at the December term 1885, the cause was argued and submitted and held under advisement until January 27, 1886, when the following opinion was delivered by Mr. Justice Somerville for the court.

[*The case in the State court will be found reported in* 80 *Ala.* 78.]

SOMERVILLE, J.—The view of this bill most favorable to complainant is that of one filed for the purpose of redeeming certain shares of corporate stock alledged to have been deposited with the defendant by way of pledge or collateral security; or, more accurately speaking, to hold the defendant liable for the appreciated value of the stock, upon the ground that he had sold it without authority and without

any notice to the complainant, who claims to be the owner and the pledgee. It is very questionable, however, whether the allegations of the bill will bear this construction, if subjected to proper criticism, and construed with requisite strictness against the pleader. The deposit of stock is averred and proved to have been made in the early part of the year 1871. The bill was filed on the 7th day of July, in the year 1884, or more than thirteen years after the original deposit. There is neither averment nor satisfactory proof of any recognition on the defendant Morris' part, of any existing trust relationship between himself and the complainant intermediate between the time of the original transaction and the filing of the bill. In the year 1881, the defendant sold the stock in controversy, it being then of less value than the amount of his pecuniary demands claimed to be secured by it. After that time it appreciated rapidly in value, and is shown by the evidence to have reached eight times its par value. The bill was, on the hearing of the cause, dismissed by the chancellor as barred by lapse of time, and the complainant brings this appeal.

It is our opinion, after very careful consideration of the law and facts of the case, that the bill was wanting in equity as an attempt to enforce a stale demand, and that the decree was free from error. Considering the transaction, in the first place, as a mere ordinary pledge of stock, rather than as partaking of the nature of both a pledge and a mortgage, as it may well be construed to be, we nevertheless deem the complainant's right of redemption to be barred by the lapse of time. It is true that we find the rule declared in the old books, and reiterated in many adjudged cases, ancient and modern, that if no time of redemption is fixed by the parties, the pledgor has his lifetime within which to redeem, unless quickened by notice, or through the intervention of a court of equity. This principle, however, is not in harmony with the more modern, and as we consider, the sounder and better rule, which is to exact of all claimants in cases of this character, analogously to the redemption of mortgages, the exercise of reasonable diligence in the enforcement of their equitable demands, at the risk of being debarred of all relief. It may be, as often said in the text books, that, strictly speaking, the statute of limitations does not run against a pledgor, in an ordinary case of pledge, unless there is shown to be an adverse possession by the pledgee, brought home to the knowledge or notice of the pledgor. But staleness of demand, which is a defense peculiar to courts of equity,

rests on another, though no doubt analogous principle, which is to visit on one who sleeps on his rights, the fruits of his own negligence and infirmity of purpose.—2 Story's Eq. Jur., § 1884. The doctrine of staleness may properly be said to be "founded in its origin upon a sound public policy, which has a just regard for the preservation of the peace of society. It is of the utmost moment that there should be some end to law suits, an unreasonable encouragement of which is disastrous to the welfare of any government. Hence, reasonable diligence in the assertion of one's rights in courts is properly exacted, not less than the exercise of conscience and good faith."

Nettles v. Nettles, 67 Ala. 599.

The growing importance of trade and commerce, with the increase of the means of rapid transit and speedy communication, have tended in modern times to shorten the period allowed by courts of equity beyond which a demand is considered stale on the ground of *laches*. The common law is no rigid system of unbending iron rules, but the elasticity of its principles is daily yielding to the growing wants of an advancing civilization. A rule of absolute repose, has, accordingly, been adopted, in comparatively modern times, which is applicable to all human transactions open to judicial investigation, and by common consent, is fixed at a period.

Garrett v. Garrett, 69 Ala. 429.

The doctrine of staleness accommodates this rule to the equities of each particular case. If it were otherwise, the numberless mercantile and other transactions of our populous towns and cities, would, in due course of time, oppress the courts with a burden of litigation which they would be incapable of enduring. No sound reason is perceived why the redemption of pledges should constitute an exception to this salutary principle. There is nothing in the relation of pledgor and pledgee which makes an invasion of the general rule, as applicable to them, either proper or desirable.

And such, in our judgment, is the current of authority among the law writers, and especially the more recent ones. We accordingly find in Story on Bailments, the principle asserted, that while prescription of the statute of limitations does not run against a pledgor's right of redemption, yet, that after a long lapse of time, if no claim for redemption is made, the right will be deemed to be extinguished, and the

property will be held to belong absolutely to the pawnee." "Under such circumstances," it is added, a "court of equity will decline to entertain any suit for the purpose of redemption. A like rule is adopted in the common law in cases of mortgages."

Story on Bailments, (8th Ed.) § 346.

So, in the recent treatise of Mr. Schouler on Bailments, after asserting that modern prescription, as applicable to pledges, runs rather by lapse of years, than the uncertain span of human life, and that "time puts an absolute barrier to the pursuit of all such remedies, irrespective of the living or dead." The author further observes: "Strickly speaking, the statute of limitations does not run against a pledge; but, in as much as it runs against the pledgee's enforcement of the secured debt or engagement, so will equity decline to entertain the pledgor's bill for redemption, if he or his representative bring it unreasonably late; for the property will then be conclusively presumed to have vested in the pledgee."

Schouler's Bailments, 225.

The same principle is recognized by other authorities, in language but slightly different. Wood on Lim. Actions, p. 54, § 22; *McClenny v. McClenny*, 49 Amer. Dec. 738; *Whelan v. Whelan*, 26 Ohio St. 131; Colebroke on Col. Securities, § 132. In *White Mountain R. R. Co. v. Iron Co.*, 50 Vt. 57, the reason for extinguishing the pledgor's right to redeem in such cases, seems to have been placed on the theory that an unreasonable delay in asserting it raises the presumption that the pledgor has relinquished his title in satisfaction of the debt."

Another, and perhaps equally as good reason is, the running of the statute of limitations against the pledgee, operating to bar the enforcement of his debt against the pledgor personally.

Schouler's Bailments, 224, 225.

This is upon the principle that courts of conscience favor the feature of reciprocity in its enforcements of equitable rights.

What lapse of time shall be regarded as rendering a pledgor's right of redemption stale, can not, of course, be formulated into any fixed rule applicable to all cases. Each case must necessarily depend upon its own circumstances, having regard, not alone, to the mere question of time, but also to the circumstances and relative situation of the par-

ties, the nature of the property pledged, whether stationary or fluctuating in value, and other facts affecting the justness or equity of the right asserted. It is, therefore, as said by Mr. Schouler, "largely a matter of judicial discretion."

Schouler Bailments, 225, *Note* 2.

It is not questioned, so far as we know, by any authority, that the pledgor may always claim, at least, the period of six years, or the full period of time during which the pledgor is permitted to sue upon his secured debt or engagement.

In *Humphries v. Terrell*, 1 Ala. 650, it was held, that the right of both a pledgor and of a mortgagor to redeem personal property, would be barred in six years, and the plea of the statute of limitations of six years, in that case was held good as a bar to the pledgor's right to redeem, without any positive evidence of an adverse possession. There is other respectable authority for the same view. But this case, in the phase of it now under consideration, does not necessarily require that we should carry the rule to this extent. The case of a mere pledgee, it is apprehended, is different, in some material aspects, from that of a mortgagee in possession, in whose favor the statute of limitations commences to run from the law day of the mortgage, because of his presumed adverse holding from that time.—Byrd v. McDaniel, 33 Ala. 18; McCoy v. Gentry, 73 Ala. 105. All that we need say on this particular phase of the case is, that the pledgor will be barred by delaying for an unreasonable length of time, which must be determined by the varying facts and equities of each particular case. In *Waterman v. Brown*, 31 Penn. St. 16, the court refused to grant relief, on a bill filed for the redemption of certain shares of bank stock, after the lapse of eleven years, the stock having in the meanwhile risen in value. The court, adopting the rule announced in *Humphries v. Terrell, supra*, held that the plaintiff's equity was barred by a delay of six years after the debt fell due, a demand for the debt being presumed to have been made is a reasonable time. The stock there in controversy, as here, had been transferred to the defendant, and having remained for a long time of less value than the amount of the secured debt, it was deemed to have been abandoned in satisfaction of it by mutual acquiescence. "We should administer equity very badly," said Lowrie, C. J., "if we should allow the plaintiff to treat the stock as the defendant's for so long a

period, and the debt as paid by it, and then to claim the benefit of a rise in value, occasioned by no merit of his." So in *Roberts v. Sykes*, 30 Bart. (N.Y). 173, it was held that a bill to redeem certain pledged stocks, which had been transferred to the pledgee, on the books of the company must be brought within ten years from the time the secured debt became due, by analogy no doubt, to the statute of limitations governing claims to personal property in courts of law.

It is well settled that a much shorter time will be allowed the pledgor within which to exercise the right of redemption, where he seeks to make a profit out of the unexpected rise in the value of pledged stocks, than where he seeks merely to compel the pledgee to account for a surplus received by him from the sale of the stocks in ordinary cases.

Schouler's Bailments, 225.

The case of *Hancock v. Franklin Ins. Co.;* 114 Mass. 155, cited and relied on by appellant's counsel, was obviously a case of the latter kind, and was determined, strictly speaking, rather on the ground of the statute of limitations than upon any alleged staleness of the demand. This rule of redemption is clearly analogous to the one which requires the exercise of any similar option in property, real or personal, to be put in action with reasonable diligence. There is something in the nature of fluctuating stocks which makes the principle especially just, when applied to them. As said by Mr. Justice Miller, in a recent case, decided by the Supreme Court of the United States, "the injustice is obvious of permitting one, holding the right to assert an ownership in such property, to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit."

Twin Lick Oil Co. v. Marbury, 91 U. S. 587.

The court observed further, that while a different rule would apply to property not subject to rapid fluctuations in value, yet, where property is of this character, courts require "prompt action in all who hold an option, whether they will share its risks, or stand clear of them."

These observations apply with great force to this case. The stock in question is shown, at one time during the period it was pledged, to have been worth as little as twenty cents on the dollar.

At the time of its sale by the defendant, it was not above par. When the bill was filed it had rapidly increased in

value, and during the progress of the cause, reached about eight times its par value, or nearly forty times the lowest rate to which it had once fallen. It is manifest that, in cases like this, justice can be administered only by curtailing the period allowed for exercising the option of redeeming within bounds, which reasonably conform it to the equities of the peculiar emergency.

Upon this state of facts, we hold that the complainant's right of redemption was a stale demand, and must be deemed to have been barred by unreasonable delay in its assertion. Sleeping on his rights for so great a length of time constitutes a degree of *laches* now fatal to their enforcement.

There is another analogous view of this case, incidentally adverted to by us above, and which is equally fatal to the maintenance of the bill. It is the defense of the statute of limitations of six years, the ground upon which the case was decided by the chancellor.

The transfer of the stock in controversy is something more than a mere pledge. It partakes of the nature of both a pledge and a mortgage, because the transferree holds both the possession and the title of the thing transferred.

The chief difference between a pledge and a mortgage is, that in the former, possession is transferred, and in the latter title, usually unaccompanied by possession. No reason is perceived why the two forms of security may not be combined in one as in here done.—*Casey v. Cavaroc*, 96 *U. S.* 467–477. In *Nabring v. Bank of Mobile*, 58 Ala. 204, it was said, *arguendo*, that a transfer of stock, like that in the present case, was rather a pledge than a mortgage, following the view expressed in *Wilson v. Little*, 2 N. Y. 442. But the decision of this point was a *dictum*, in as much as it was immaterial and unnecessary, the same result following whether the transfer was construed to be the one or the other. In this aspect of the law, to which I am not averse, there can be no room for disputation as to the fact that the case made by the bill was barred in six years from the day of forfeiture, there being no proof of any recognition of the complainant's title within this period, and therefor a presumed adverse holding by the defendant.

Byrd v. McDaniel, 33 Ala. 18; *Humphries v. Terrell*, 1 Ala. 650.

Waterman v. Brown, 31 Penn. St. 161, *supra*; Jones on Chat. Mort. §§ 771–772.

The bill was properly dismissed, and the decree of the Chancellor is
Affirmed.

And the Supreme Court, pursuant to the opinion delivered, rendered a decree affirming the decree of the Chancellor. Record, p. 298. Appellee, through counsel, filed an application for a rehearing and modification of the decree rendered, so as to make the dismissal without prejudice, and filed in support of this application the briefs offered in evidence and shown in the *Record*, Exhibit 3, p. 343; Exhibit 4, p. 355. On this application, Chief Justice Stone, for the court, filed the following opinion, refusing the application to modify the decree.—*Record*, p. 295:

"STONE, C. J.—The spirit of modern jurisprudence is to shorten the time in which business transactions may be made the subject of judicial contention. Statutory bars are shortened, and the courts of the country at the present time are much more inclined than they formerly were to discourage and discountenance the stirring up of ancient or stale demands. The theory on which the modern policy rests, is, that claims of real merit, in these stirring times, will not be permitted to slumber through an indefinite, or unreasonable number of years. And, when the case presented is one of patent inequality; one in which the right claimed has no corresponding liability resting on the claimant, courts are much more averse to granting active relief than if the liabilities were mutual.

This court has placed itself unmistakably on the side of the shorter limitations and the discouragement of stale claims.

James v. James, 55 Ala. 525; *Gordon v. Ross*, 63 Ala.; *Cotton v. Cotton*, 75 Ala. 345.

I have read and scrutinized the testimony in this record with very great and painstaking care. I find not a semblance of proof that any time after the spring of 1875, any credit was extended to F. M. Gilmer, to J. N. Gilmer, or to any of the firms with which the latter was connected, on the faith of the stock in the Elyton Land Company, as a security. I do not find it was ever mentioned between the parties, or had in contemplation in connection with any of their dealings, when they took place; on the contrary the proof is, that

whenever any credit was extended by Morris, or Morris & Co., to F. M. Gilmer, either for himself, or for any of J. N. Gilmer's firms, other sources of payment were looked to, and stipulated for. And, in fact, I do not find the stock was ever spoken of, or looked to as a means of security, or source of payment, in any of the credits extended by Morris after the stock was transferred and placed with him in 1871, except what is hereafter stated. If it was thought of a security for any future credits, the present record contains no proof of it. It may be and probably is, true, that after those debts were contracted, Morris intended that if the stock ever became of sufficient value, he would resort to it as a means of security and payment as far as it would go; but there is neither averment nor proof of any agreement to that effect. This, if entertained at all, was a mere uncommunicated intention, and does not amount to a recognition of appellant's continued claim or ownership of stock, unless what is hereafter stated shows such to have been the intention. Nor does the fact that Morris, up to the time he disposed of the stock in 1881, would have been willing to have the stock redeemed, if the Gilmers, or either of them, would pay him the several liabilities under which they rested, vary the question. That, at most, was a mere uncommunicated mental purpose—perhaps not thought of, nor entertained at the time it would have been possible of performance. A mere after thought, which any sane man would entertain, who held a large claim and insufficient means of collection. There must, in the nature of things, be a time in all such transactions, when the pledgee or mortagee ceases to look upon the thing pledged or mortgaged as a continuing security for a subsisting demand, and commences to treat it as his own property, made such by the pledgor's delay and *laches*. I repeat, there is no testimony—not the slightest—of any act done, or word spoken after the transfer of the stock on the books in 1875, tending to show that any transaction was had between the parties, in which the stock was to any extent a factor, unless the following question and answer furnish such testimony. Morris, while being examined as a witness, was asked: "Then how can you say, Mr. Morris, as you have said, that Mr. Gilmer agreed with you that that stock should be held by you as collateral for anything that he, or Gilmer & Donaldson, or Gilmer, Browder & Co., did owe, or might owe?"

The Mr. Gilmer here referred to, was F. M. Gilmer. To this, Morris, answered: "Yes, sir, it is the truth, because

I talked to Mr. Gilmer very frequently about it threatening to sell it."

The firm of Gilmer, Browder & Co. was formed in 1868, and expired in 1873, or 1874, when the firm of Gilmer & Donaldson was formed. The latter firm expired at the death of Mr. Donaldson in 1876. The last transactions had between Morris and Gilmer & Donaldson, of which we have any testimony, were deposits in March, 1875, and execution against J. N. Gilmer, levied on the stock and paid by Morris, charged against that firm in July, 1875.

No date is fixed by the witness, nor in any other way, when Morris talked to Mr. Gilmer very frequently about it, threatening to sell the stock, whether it was before or after the stock on the books, or, if after, how long after, we have no means of finding out. We can not say it was later than 1876, or as late as 1876. We have Morris' uniform testimony that he ceased to look to it as an available demand after the actual transfer of the stock in 1875, and we can not say there is any testimony which contradicts this. True, he had some collaterals in his hands, considered at the time of little or no value ; though from one of them he realized as much as $900 as late as 1880. This sum, however, and the stock sold at par, fell far short of indemnifying him, or paying him the combined indebtedness of F. M. Gilmer, and the various firms in which J. N. Gilmer was a partner. On the most liberal interpretation, there is no testimony of any transaction which recognizes that Gilmer had any claim on the stock, which we can affirm took place within eight years of the filing of this bill.

Sanders v. Askew (MS.) at this term. Whatever class the present transaction may have previously belonged to, when by the transfer on the books the title to the stock became vested in Morris, it acquired the properties of a chattel mortgage, the thing mortgaged being in the possession of the mortgagee. For nine years Morris held both the title and the possession of the stock, and during all that time Gilmer is not shown to have asserted any claim to it. In Humphries v. Terrell, 1 Ala. 650, decided by this court more than forty years ago, it was held that six years posse ssion of a chattel pledged, without demand made, or recog nition of the pledgor's right, vested a complete title in the pledgee. That case has not been overruled, and I am not inclined to overrule. All men will admit that a period of six years vests in a mortgagee a title to a chattel held for that length of time in independent right. We are asked to so far

modify the chancellor's decree as to make it a dismissal without prejudice to another suit. The submission in this cause was on pleadings and evidence. When such is the case, if it be desirable to have the special ruling of the court on the pleadings, it is customary to prefer a request therefor. That does not appear to have been done in this case. The ruling of the chancellor was on the testimony, and governed by it alone, he reached the conclusion that complainant's claim was barred by staleness. We have examined the testimony with great care, and have reached the conclusion that the chancellor did not err in his rulings on the testimony, nor in the application of the law thereto. If the bill had been all the complainant could desire; if it had averred acts of recognition by Morris, so as to relieve the claim of the imputation of staleness, the proof in the present record would not sustain such averments.

The claim under the proof would still be stale, and barred on that account. This is not a case of sufficient proof and insufficient averment. If it were we would grant the motion and dismiss without prejudice.

Cameron v. Abbott, 30 Ala. 416.
Munchus v. Harris, 69 Ala. 506.
Gilmer v. Wallace, 75 Ala. 220.
Glass v. Glass, 76 Ala. 368.
2 Dan. Chan. Prac. 994–957.

The record makes no such case. We are asked to grant the order, not because the complainant has shown a right to recover, but fails through defective pleading. The naked proposition is, that the complainant is entitled to the order that he may have a chance to aver and prove a better case. Would it not be an anomaly if we were told that where the pleadings and proofs are both insufficient the dismissal will be without prejudice; and yet, if the pleadings be good and the proof insufficient, the decree will be absolute and final? Such practice is sanctioned by no sound precedent, and is diametrically opposed to that wholesome principle of equity practice which discourages the re-examination of witnesses once examined, except for good reasons, satisfactorily shown; and discountenances enlargement of publication, in the absence of a very strong showing.

John v. Glascock, 2 Ala. 249.
Grier v. Campbell, 21 Ala. 327.
Rumbly v. Stanton, 24 Ala. 712.
Lanier v. Hill, 30 Ala. 111.
Malone v. Carroll, 33 Ala. 191.

Smith v. Coleman, 59 Ala. 260.
Hammersly v. Lambert, 2 Johns. Ch. 432.
1 Dan. Chan. Pract. 948–49.

We decline to modify the decree of the chancellor.

After these opinions were filed appellee, about April 1, 1886, went to Memphis in the State of Tennessee, and on the 20th of September 1886, filed the bill in this cause in the Circuit Court of the United States. The case presented by this bill is substantially as follows:

Par. 1. That in 1870, appellee "being a subscriber to the capital stock of the Elyton Land Company for 120 shares of the par value of $100 a share but issued at fifty cents on the dollar, made an agreement with Josiah Morris that he should advance the money, six thousand dollars, necessary to pay for said stock, as required by said company, and wait upon orator for repayment, and hold said stock as a pledge for such repayment."

Par. 2. That Morris did pay the $6,000 for the stock as required, but when appellee did not know and has not been informed, and the stock, pursuant to the agreement, was placed with "Morris as a pledge for the repayment of said advance, and was, to make said pledge effectual, transferred, by indorsement on the certificate of stock issued in orator's name, to him the said Morris."

Par. 3. That afterwards, by the consent and direction of appellee, 60 shares of the stock were sold for $6,000 by Morris, and the proceeds paid to him, and by him placed to the credit of the original cost of the stock. A certificate for the other 60 shares was issued to appellee, transferred by indorsement and delivered to Morris pursuant to the original agreement and as a pledge to secure the balance due on the original payment of the stock, and matters continued thus until March 1875, up to which time Morris made no demand on him for the balance or had the stock transferred to him, but permitted it to stand in appellee's name on the company's books, and appellee took part in the company's meetings as a stockholder.

Par. 4. That the purpose and object of the company was to buy lands on speculation at the crossing of two or more railroads, and to await the building of a city, and that the city of Birmingham was built on the site purchased.

Par. 5. That the progress of the city of Birmingham was not great until 1880 and the stock paid no dividends until 1883, but since that time it had been paying as much as 100 per cent. per annum in dividends on the par value, and promises to do so indefinitely, but after the sale of the 60 shares in 1871, and up to March 1875, the remainder was at all times worth more than the balance for which it was pledged up to that time to Morris, and since 1875 has not been worth more than par, and in 1881, when Birmingham was an assured success, the prospects of dividends became a reality and the stock became valuable, and in 1884 said stock, with dividends received, was worth $40,000, and at the time of filing the bill was worth not less than $150,000.

Par. 6 and 7 are in the following words:

> "That in the early part of 1875 orator, as he had been for many years before, was a resident of the city of Montgomery, Alabama, and formed a co-partnership with one Presley W. Donaldson, who was orator's brother-in-law, and who resided also in said city of Montgomery, to do and carry on a warehouse and cotton commission business in said city.
>
> That orator had for many years prior to that time carried on business in said city, and in connection therewith had, from 1870, and prior thereto, up to 1876, kept a bank account with the bank of said Morris, carried on under a copartnership between said Josiah Morris and the said F. M. Billing, under name of Josiah Morris & Co., the said Morris being the active and leading member of the said firm; and orator desiring, on the formation of his said partnership with said Donaldson, to continue his bank account with said Morris & Co., and to obtain from them, from time to time, some accommodations by way of loans and discounts, arranged and agreed, in the early part of the

year 1875, with the said Morris that the said stock should be held by him not only to secure such balance as was due him on the original purchase thereof, but also for all indebtedness which the said firm of Gilmer & Donaldson might incur to him, or his banking firm of Josiah Morris & Co., and that afterwards, and in pursuance of said agreement, and up to the death of said Donaldson in 1876, the bank account of said Gilmer & Donaldson was opened and continued with said J. Morris & Co., and loans and discounts were made by said J. Morris & Co. to them, from time to time, so that, on the dissolution by the death of Donaldson, the firm owed said J. Morris & Co. the sum of $2,323.03. That this balance, however, was secured to said J. Morris and Co. not only by said stock of orator, in the hands of said Morris as aforesaid, but by other securities and stock placed in the hands of said Morris for that purpose by the said Donaldson, and that by a sale of a part of these securities by said Morris on the 11th of March, A. D. 1880, or about that time, the net sum of $975 was realized by said Morris and placed to the credit of the account of said firm of Gilmer & Donaldson, which credit, with a small deposit by orator, reduced the balance to $1,412.53, or about that amount, and said balance thus reduced is still due said J. Morris & Co."

Par. 7. "That in March, A. D., 1875, orator's said stock in the hands of said Morris while it was standing in orator's name on the stock book of the said Elyton Land Company, was levied on as his property by the sheriff of Jefferson county, Alabama, to satisfy an execution in his hands, in favor of one Farley, on a judgment against orator and others, and amounting to about $233.60. That, upon such levy being made, orator entered into a new agreement with said Morris that he should pay said debt, or discharge said levy, and have the said stock transferred to him on the books of said company, and hold the same as a pledge to him for the payment of the balance due

on the original purchase and the sum necessary to be advanced to discharge said levy and all indebtedness which orator and his firms might incur in the future to him, or his banking firm of J. Morris & Co. That said Morris, in pursuance of this agreement, which was accepted and acceded to by him, paid said judgment or discharged said levy, and on the 12th day of July, 1875, charged up the amount so paid to effect the discharge of said levy, $233.60 to the account of orator's said firm of Gilmer & Donaldson, with said J. Morris & Co., and also had, prior thereto, the said stock transferred on the stock book of said company to his name, and has since that time so held said stock. That, during the course of the dealings of orator's said firm of Gilmer & Donaldson, with said Morris, the latter also had charged up to the account of said firm with his said bank the balance, less than $30 due to said bank on balancing the account of orator's firm of Gilmer, Browder & Co., which had been doing business with him for many years prior to 1875, and which was dissolved on the formation of said firm of Gilmer & Donaldson." Record pp. 2–3.

Par. 8. That on the dissolution of Gilmer & Donaldson, by the death of Donaldson, appellee, continued to do a small, though regular business on his own account, under the name of J. N. Gilmer & Co., with Morris' bank, until May 30th, 1879, when he formed another partnership with one Clanton, under the name of Gilmer & Clanton, and ceased business as J. N. Gilmer & Co. That J. Morris & Co., on the faith and credit of the stock, extended small credits to appellee, as J. N. Gilmer & Co., and, at the close of the dealings, appellee owed a balance of $222.43, for the payment of which, the stock was bound, and this amount was paid in full, as follows: June 8th, 1881, $230.00 cash, and a note given May 31, 1883, which was paid October 3rd, 1883.

Par. 9. That, after J. N. Gilmer & Co. ceased to do business, appellee opened an account with Morris & Co's bank,

under the name of the firm of Gilmer and Clanton; and, afterwards, Clanton sold out his interest in this firm, and appellee, and one F. H. Merritt, formed a partnership under the name of Gilmer & Merritt, and this firm continued this business until some time in 1882. That, during the continuance of all of these firms, Morris, through his bank, extended credit and made loans of money to them, on the faith and credit of the stock belonging to appellee, in his hands as a pledge, but the two last mentioned firms left no balances against them on closing their accounts with Morris' bank.

Par. 10. That, for many years prior to the close of the late war, appellee's father, F. M. Gilmer, was a man of large means and extensive business, and after the war he occupied influential positions of benefit to bankers having his confidence. That. for 40 years prior to 1880, Morris had been a banker in the city of Montgomery, and he and F. M. Gilmer had been intimate and confidential business friends, and through this intimacy appellee and his partner and brother-in-law, Donaldson, acquired great confidence in Morris, so much so that they took no receipt for very valuable property entrusted to him. That, owing to the esteem and confidence generated by the confidence of his father, appellee entrusted the stock with Morris, as it was originally done, and "awaited, without question, the event originally contemplated, upon which the stock would become valuable, without doubting Morris would be honorable and true to his trust." That, from the early part of 1875, during the existence of all the firms spoken of and all their business, orator and Morris lived in the same town, were members and officers of the same church, saw each other constantly, and had almost daily business transactions, yet Morris never notified him of the amount he claimed, nor gave any notice or demand of appellee to redeem the stock, nor did he give any notice that he had sold or would sell it, nor that he was holding it otherwise than as pledgee. Appellee avers that Morris not only never denied, but he continuously, from March 1875 to 1884, held, and acknowledged that he held, the stock as a pledge.

Par. 11. That appellee first learned the stock had commenced paying dividends early in 1884, and supposing that Morris had received enough to pay the balance due him, appellee called on Morris to enquire about the stock and was amazed at Morris' statement that he had never held any stock for him, and that the particular stock enquired about had been sold by him to one Baldwin of New York in 1881.

Par. 12. That in 1881 Morris believed the stock of the Elyton Land Company would become very valuable and increased largely his holding of the stock, and ever since that time the stock has continuously and rapidly increased in value, and when the interview took place in 1884 appellee's said stock was worth, with dividends, $40,000, and he avers that this rapid and large increase in value induced Morris to deny the trust and to desire to appropriate the stock, whereas other less valuable stock pledged by Donaldson was faithfully accounted for.

Par. 13. That the statement of Morris that the stock had been sold by him in 1881 to one Baldwin or any other person is and was untrue, and is a pretense by which Morris seeks to evade the odium of being false to his trust, and arose out of the following circumstances: One J. R. Powell owned 426 shares of the stock, which he had pledged to Morris to secure an advance of $40,000, and Morris wishing to secure his debt and increase his holding of stock, agreed to buy this stock at par, but before this trade was made and in view of it, Morris contracted to sell 300 of these shares to certain parties in New York. For some reason Powell did not deliver all of his stock at once, and Morris sent 410 shares of his stock to be transferred, and happened to include the certificate for 60 shares; that thereupon certificates for 300 shares were issued to the New York parties and a certificate for 110 shares was returned to Morris. That he supposes that Morris sent the certificate for the 60 shares by accident or because he did not think he was bound to keep the identical stock, but only an equal amount to answer the trust. He avers that Morris never contracted to sell his stock or any number of shares corresponding with

his, and gave no directions to the officer when the transfer was made to transfer these shares to the New York parties, and no one knows or can tell whether this stock was included in the certificates issued to the New York parties or in that returned to Morris; that Morris had no idea that the transaction was a sale, since he gave no notice of the sale, and entered no credit of the proceeds on any account, and because a sale of such stock without authority and without notice to redeem, and without notice that the sale was made and without crediting up the proceeds would have been contrary to all business and honorable dealing. But in 1884 the great value of the stock being assured, Morris availed himself of this pretext of a sale in 1881 to avoid accounting for it as a subsisting trust.

Par. 14. That Morris pretended, notwithstanding all of the transactions alleged in the bill which are here collated, that the stock never did belong and does not now belong to appellee, but to his father, F. M. Gilmer, and that his father, when the stock was subscribed for in appellee's name, owed and still owes him, Morris, large debts and advances made and contracted on the faith of this stock, and that F. M. Gilmer having gone into bankruptcy and no suit having been brought within two years by his assignee, the stock is his, Morris', own property. He then avers that this is all, an after thought and untrue, and denies that F. M. Gilmer ever had any authority, or that he ever did pledge this stock for any debt or advance of his.

Par. 15. That Morris had received dividends on said stock amounting to $20,000 or other large sum.

Par. 16. That on an accounting appellee would not owe either of the defendants anything, but Morris would be largely indebted to him, but he offered to pay any balance which may be found against him.

The prayer is as follows:

"And your orator prays that the said defendant, Josiah Morris, may be compelled by a decree of this court to account for and pay over to orator all such dividends as may have been paid on orator's said stock, since the same has been in his hands as aforesaid, after deduct-

ing any and all indebtedness on the part of orator to said Morris and his said firm of Josiah Morris & Co., for which said stock and dividends are liable in the hands of said Morris; and that sixty shares of said stock as received by said Morris be decreed by this court to be transferred by said Morris."

The bill then concludes with a prayer for general relief and for process. [The original bill, Record, pp. 1–8.]

The defendants entered an appearance and on the 1st day of November, 1886, filed the plea of a former adjudication in the courts of Alabama, and attached thereto as an exhibit the record and decree of the State courts of Alabama shown in the Record, pp. 11–35.

Appellee filed exceptions to this plea, and these exceptions were set down for argument, and being argued and submitted were sustained by the circuit court, but the plea was allowed to stand as an answer to so much of the bill as it would apply to. (Order overruling plea, Record, p. 41.) On making this order, Hon. John Bruce, the District Judge, filed the opinion found on page 36 of the Record.

Within the time limited by the decree the defendant, Morris, answered under oath, and the defendant, Billing, filed a disclaimer. In his answer, after fully answering on the merits, the defendant, Morris again, relies on the adjudication of the State courts of Alabama as a bar to any relief. (§ 19. Answer Josiah Morris, Record, p. 52.) In his answer appellant also relies on the statute of limitations of the State of Alabama of six years, staleness and laches. § 18. Answer Josiah Morris, Record, p. 62.

Replication was filed and the parties proceeded to take testimony. Appellee and his father, F. M. Gilmer, were examined as witnesses. On the cross-examination of F. M. Gilmer he testified that appellee had removed to the State of Tennessee under his advice for the purpose of bringing this suit in the United States Court. (Dep. F. M. Gilmer, Record, p. 84.) And appellee on cross-examination testified that he removed to the State of Tennessee May 1st, 1886, after the decision of the Supreme Court of Alabama against him for the purpose of giving the Federal Court of Alabama

jurisdiction of this suit, and that in case he gained this suit he expected to return to Montgomery, Alabama, where he was born and raised, to live. Dep. J. N. Gilmer, Record, pp. 98, 99.

On December 17th, 1887, before the hearing of the cause, appellant presented to the presiding judge of the circuit court the affidavits of Adolphus Gerald and himself, showing that in May or June, 1887, appellee returned to the State of Alabama to reside permanently. Record, p. 69. And on these affidavits and the parts of the depositions of appellee and F. M. Gilmer referred to, made a suggestion to the court that the cause was improperly in that court, and that complainant was not then nor at the time of the commencement of that suit a citizen of the State of Tennessee, but was in fact a citizen of the State of Alabama, and moved the court to proceed no farther in the cause but to dismiss the suit. Record, p. 70.

This suggestion and motion were overruled and denied by the presiding judge. Record, pp. 70, 71.

The cause was then heard, and the court being of opinion that appellee was entitled to recover, so declared in its decree and directed a reference to a special master to state an account between the parties. Record, p. 380.

Upon the coming in of the Report a final decree was rendered in favor of appellee (Record, p. 388), and thereupon appellant prayed an appeal in open court, which was duly allowed by the presiding judge. Record, pp. 389, 390.

ASSIGNMENT OF ERRORS.

Appellant assigns as error—

First—The order of the circuit court, overruling the motion, and suggestion of appellant to dismiss this cause, and proceed no further therein. Record, p. 70.

Second—The order of the circuit court, sustaining exceptions of appellee, to the plea of appellant, of a former adjudication, filed herein. Record, p. 41.

Third—The decree of reference herein in so far as the

same declares that appellee is entitled to redeem the sixty shares of Elyton Land Company's stock. Record, p. 380.

Fourth—The decree of reference herein in so far as the same declares appellant is liable to account for, and pay over any dividends, increments, or profits, arising from the sixty shares of stock. Record, p. 380.

Fifth—The final decree rendered. Record, p. 388.

ARGUMENT.

We have assigned errors, and shall argue the questions presented in somewhat different order from that in which they are presented in the Record, for the reason, that if the court is of the opinion that the motion to dismiss the cause is well founded, it dispenses with the necessity of considering the other questions discussed, and we will therefore first discuss the order of the circuit court, overruling the suggestion and motion of appellant, to dismiss the suit.

We respectfully submit that upon the facts shown by the evidence taken in this cause, and the affidavits on file, it is established conclusively that this suit is not one of which the circuit court should have retained jurisdiction; that appellee, at the time of the filing of the bill, was not in reality a citizen of Tennessee within the meaning of the Act of Congress. The Act of 1875, 18 U. S. Statutes, 470, sec. 5, is as follows:

"That if, in any suit commenced in a circuit court, or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no farther therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just. But the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

It is well established that this objection may be taken at any time, even though no plea be filed.

Barney v. Baltimore City, 6 Wall. 280.

Williams v. Nottawa, 104 U. S. 209.

This statute has been under review by this court, in a number of cases.

In *Williams v. Nottawa*, a citizen of Indiana sued in the Circuit Court a township of Michigan upon certain bonds issued by it and payable to bearer. He owned some of them, and the others were transferred to him by citizens of Michigan solely for the purpose of collection. Judgment was rendered in favor of the township on the bonds so transferred, and in favor of the plaintiff on the others. The plaintiff removed the case by writ of error to this Court, when this Court, on its own motion, dismissed the suit. Chief Justice Waite, in delivering the opinion, says, page 212:

"Inasmuch, therefore, as it was the duty of the Circuit Court, on its own motion, as soon as the evidence was in and the collusive character of the case shown, to stop all further proceedings and dismiss the suit, the judgment is reversed, and the cause remanded with instructions to dismiss the suit at the costs of the plaintiff in error, because it did not really and substantially involve a dispute or controversy within the jurisdiction of that court, leaving the parties in interest to such remedies as they may each be entitled to for the recovery of any amount that may be due them respectively on the bonds they severally own. In this connection we deem it proper to say that this provision of the act of 1875 is a salutary one, and that it is the duty of the circuit courts to exercise their power under it in proper cases. If they improperly dismiss a cause their action in that behalf is expressly made reviewable here. Whether, if a defendant allows a case to go on until judgment has been rendered against him, he can take advantage of the objection on appeal, or writ of error, we need not now decide. That would be a different case from this. Here the party guilty of collusion asks relief from a judgment against himself. In such a case we deem it our duty to stop the suit just where it should have been stopped in the court below, and remit the parties to their original rights."

In *Hawes v. Oakland*, 104 U. S. 450, where a bill was filed by a stockholder to restrain the collection of a tax against a corporation in the Circuit Court of the United States for

the District of California, upon the allegation that the directors had refused to take action in the matter, the court, while admitting the jurisdiction, if *bona fide*, held that it was a collusive attempt to give jurisdiction to the United States Court; and Mr. Justice Miller delivering the opinion, on page 459, says:

"And this same statute, while enlarging the jurisdiction of the circuit courts in cases fairly within the constitutional grant of power to the Federal judiciary, strikes a blow, by its fifth section, at improper and collusive attempts to impose upon those courts the cognizance of cases not justly belonging to them. It declares, if at any time in the progress of a case, either originally commenced in a circuit court, or removed there from a State court, it shall appear to said court "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further, but shall dismiss the suit or remand it to the court from which it was removed.

It is believed that a rigid enforcement of this statute by the circuit courts would relieve them of many cases which have no proper place on their dockets."

In *Detroit v. Dean*, 106 U. S. 537, a case where a non-resident stockholder filed a bill to enjoin tax proceedings against a corporation, this court, in the face of the fact that a majority of the directors of the corporation had refused, by a resolution, to bring suit held that the suit was collusive and within section 5 of the Act of 1875, and dismissed it upon a suggestion made here.

See, also:

Hayden v. Manning, 106 U. S. 586.

Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121.

Farmington v. Pillsbury, 114 U. S. 138.

Robinson v. Anderson, 121 U. S. 522.

It is not denied that prior to the Act of 1875, some of the decisions recognized the right of a party to move into another State for the purpose of bringing suit in the Federal Court, but even a casual reading of these cases will satisfy the mind that the rule of law in regard to domicil is not affected

thereby. The deposition of J. N. Gilmer shows that his domicil of origin was in Alabama, and this domicil being established the *onus* of showing a change is on the party alleging it. There can be no new domicil acquired in any event until there is an absolute abandonment of the old one, not for a particular purpose, nor for any stated period, but an absolute, unconditional giving up of the old domicil with the intent to acquire the new one. The principle is very clearly stated in Jacob's Law of Domicil, § 195, p. 274, quoting from the opinion of Lord Westbury, in *Udny v. Udny*, L. R. 1 Sch. App. 441, as follows:

"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of a term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness, and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation."

See as directly in point—

De Bonneval v. DeBonneval, 1 Curteis, 856.

Somerville v. Somerville, 5 Vesey, Jr., 750.

White v. Brown, 1 Wall. Jr., 262.

Ennis v. Smith, 14 How. 262.

In order to constitute a domicil in another State it is necessary that the party removing must have the intention at the time of, or after the removal to remain permanently or for an indefinite period in the State to which he has removed.

Gardner v. Sharp, 4 Wash. C. C. 609.

Mitchell v. U. S. 21 Wall. 350.

Case v. Clarke, 5 Mason, 70.

Cooper v. Galbraith, 3 Wash. 546.

The rule is also well established that the native domicil, or domicil of origin, easily reverts.

1 Am. L. C. 745, top, 4th Edition.

Craigie v. Lewin, 3 Curteis, 435.

The Venus, 8 Cr. 253.
State v. Hallett, 8 Ala. 159.
Merrill v. Morrissett, 76 Ala. 433.

Residence is merely *prima facia* evidence of domicil, and has been said to be only equivocal as evidence of the *animus.*

Jacob on Law of Domicil, §§ 379, 380.
Isham v. Gibbons, 1 Bradf. 69.
Jopp v. Wood, 4 DeG., J. & S. 616.

This court draws the distinction very clearly in the cases where citizenship is alleged as the basis of the jurisdiction of the Circuit Court.

Robertson v. Cease, 97 U. S. 646.
Grace v. American Central Ins. Co., 109 U. S. 278.

Long before the passage of the act of 1875, the courts of the United States had recognized and enforced the rule that parties could not give jurisdiction to the Federal Courts by merely removing from one State to another for that purpose.

In *Catlett v. Pacific Ins. Co.*, 1 Paine, 611, decided in 1826, the court, Mr. Justice Thompson, delivering the opinion, says:

"If he (Catlett) had avowed that his sole object was to place himself in a situation to bring this suit with an intention of returning to his former residence when it was ended, it might have been considered a fraud upon the law."

And in *Butler v. Farnsworth*, 4 Wash. 101, decided in 1821, the court, Mr. Justice Washington, says:

"If the removal be for the purpose of committing a fraud upon the law and to enable the party to avail himself of the jurisdiction of Federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not a *bona fide* intention of changing his domicile, however frequent and public his declarations to the contrary may have been."

Case v. Clark, *supra.*

The testimony of appellee on the cross-examination, brings him within the rule laid down in the case of Catlett v. Pacific Ins. Co., *supra.* We quote from his deposition, taken on April 29th, 1887:

Q. Where do you reside now?
A. In Memphis.
Q. What State?
A. The State of Tennessee.
Q. How long have you resided there?
A. One year.
Q. Did you not go there, Mr. Gilmer, for the purpose of getting jurisdiction to the Federal Court of this State?
A. I did, sir.
Q. Is it not your purpose to return to Montgomery if you gain this suit?
A. That depends altogether upon circumstances.
Q. What circumstances?
A. If inducements be offered to make it to my interest, I may.
Q. Well, is there not expectations that such inducements will be offered?
A. I have had inducements offered, but I have not accepted.
Q. I repeat the question. Is not it your expectation that in the event you gain this suit, such inducements will be offered you to return here, that you will accept them?
A. Yes, sir.
Q. So that you think if you gain this suit you will come back to Montgomery to live?
A. Yes, sir.
Q. Were you born and raised here in Montgomery?
A. I was.
Q. And lived here until May, 1886, or June, was it?
A. I left here on the 1st day of May, 1886.
Q. That was after the suit in the State Chancery Court had been decided against you in the Supreme Court of Alabama?
A. Yes, sir.
Dep. J. N. Gilmer, Record p. 98.

His father testifies that he advised him to remove for the purpose of bringing this suit, and from his own and his father's deposition, the only inference to be drawn is, that was his only purpose.

We give his father's evidence on this question:

Q. I ask you if he did't tell you that his purpose in moving to Tennessee was for the purpose of bringing this suit in the United States court?
A. He did not tell me that.
Q. I ask you if you do not know it was his purpose, and if it was not done under advice?

A. I can tell you what I believe, but I cannot tell you what I know about it. I do not know it.

Q. You say that you do not know whether that was his purpose, or whether he was ever so advised?

A. Well, I can say I advised him to do that.

Q. Well, before his removal?

A. Yes, sir.

Q. How long before he removed was it that you advised him?

A. Well, it was some months.

Q. When did you so advise him? Was it after the decision of the Supreme Court of Alabama, in the Chancery suit that you have spoken of?

A. Yes, sir, it was after that.

Q. I ask you if you didn't advise him to move for the purpose of bringing this suit in the United States court?

A. I did.

Dep. F. M. Gilmer, Record p. 84.

By this it appears that appellee, after the final disposition of his cause concerning this identical stock in the Supreme Court of Alabama, removed to Tennessee for the purpose of giving jurisdiction to the Federal Court of Alabama, under the advice of his father. He does not pretend to state or show that he ever went to Tennessee with the purpose of making that a permanent residence, or of remaining there beyond the time when this case was decided, and he does show that during his stay in Memphis inducements were offered to him to return to Alabama; and he expressly states that in the event he gained this suit it was his purpose and intention to return to Alabama to live.

The question is asked, "So that you think if you gain this suit you will come back to Montgomery to live?"

And the answer is, "Yes, sir."

Can it be argued that this testimony establishes the *animus manendi*, or the abandonment of his domicil of origin, except for the special purpose of bringing this suit.

For permanent residence, which some of the books use as synonymous with citizenship under the act of Congress, it is necessary that the change of residence should be with the intention of permanently residing at the place of removal, or remaining there an indefinite period. Appellee shows

that his domicil of origin was in Montgomery. He doesn't undertake to swear that he ever intended to remain permanently in Tennessee. He shows no act indicating citizenship in Tennessee. Simply a removal with the expectation that inducements would be offered to him to return to Montgomery.

The *onus* of establishing citizenship in Tennessee when it was questioned in taking his deposition, was upon appellee; and can it be said that his deposition, or that of his father, establishes the intent which the law requires in order to create a domicil?

In order to ascertain what the intent of a party was at a given time his subsequent conduct may be looked to.

Appellee swears it was his expectation to return when this suit was ended, in the event he gained it, and he was expecting inducements to be offered him to return, even before that time.

His deposition was taken on the 29th of April, 1887.

Within six weeks thereafter appellee returned to Montgomery, where he has since resided.

It is hard to conceive of any case more plainly within the very letter and spirit of the Act of 1875 than this, and the decisions of this Court call for a strict enforcement of the provisions of the Act of 1875. A more flagrant violation of the letter and spirit of that statute, can hardly be conceived of.

We do not admit the proposition that a party may, since the Act of 1875, remove from one State to another for the purpose of giving the Federal Courts jurisdiction of his suit; we maintain that in every such case, the removal for this purpose of giving jurisdiction, must be with the intent to remain permanently or indefinitely in the State to which the removal was made, or, in other words, there must be a *bona fide* change of domicil, "a residence freely chosen," "and not for a limited period or particular purpose."

The length of time which a party remains in the State to which he has removed is simply a circumstance to show the

bona fides of the intention to make the place of removal a domicil. Mere residence, without intent, will not create a domicil, as has been repeatedly held.

The intent or *animus* and removal or *factum* must combine to constitute a change of domicil or citizenship.

Bragg v. State, 69 Ala. 204.

It was contended in the court below that as no plea in abatement denying the citizenship of appellee was filed, and the evidence of appellee and his father was not pertinent to any issue made by the pleadings in the cause, this evidence could not be made the basis of a motion to dismiss under section 5 of the act of 1875 quoted above, and this position was sustained by the court on the authority of *Hartog v. Memory*, 116 U. S. 588.

We respectfully submit that the expressions in the opinion in that case relied upon to sustain the order of the court below were unnecessary to a decision of that case, are in conflict with the express terms of the statute, and the construction given it in the cases cited.

No one would question the propriety or soundness of the decision in Hartog v. Memory, but we insist that the opinion as construed by the court below in its application to this case, the effect is to overturn and reverse a rule of practice which has been recognized and followed in this court since its decision in Barney v. Baltimore (6 Wall. 280) 1867. Whether parties have collusively or improperly brought or removed a case into the Federal courts seems to be a question open in every case in those courts, and the inherent right of the court to protect itself from frauds on its jurisdiction, has been recognized and asserted regardless of the pleadings whenever the facts appeared in the record, and the duty imposed by the statute to dismiss has been performed, however the facts are made to appear. Of course this rule is subject to exceptions, and the facts in Hartog v. Memory show that case is an exception. There the defendant knew all the facts upon which he relied to defeat the jurisdiction, declined to plead them or put

them in issue, was himself examined as a witness to establish them, had a trial on the merits and was defeated, and then undertook to avoid the result of the trial by setting up a want of jurisdiction. Manifestly this should not be permitted for many reasons, for as has been said by this court in Railway Co. v. Ramsey, 22 Wall. 327, "They have asked the court to act upon this admission, and proceed with the cause. The court did proceed." The defendant in Hartog v. Memory was estopped by his conduct from setting up the defect of jurisdiction arising from citizenship. But we insist that Hartog v. Memory does not mean, as was contended for in the court below, that though collusion is affirmatively shown by facts proved without objection, and made part of the record, that the court must shut its eyes when attention is called to these facts and say the collusion is proved to our satisfaction, but the evidence is not "material to the issues," and hence we cannot act on your motion.

Such a construction of section 5 of the act of 1875 would go far toward enabling parties to practice frauds upon the jurisdiction of the circuit courts, which this court has so often held it was the object of the section to prevent. *Smith v. Kernochen*, reported in 7 How. 216, was the first case in which the question of a colorable assignment as a defense was presented. It was a suit at law brought by Kernochen against Smith to recover certain land in Alabama, which had been conveyed by way of mortgage to an Alabama corporation and by it assigned to Kernochen, who resided in New York. It was insisted on the trial that this assignment was merely colorable and intended as a fraud on the jurisdiction of the circuit court. No plea in abatement was filed and this court on error held—

"The objection came too late after the general issue. For when taken to the jurisdiction it must be taken by plea in abatement and cannot be raised in the trial on the merits," citing D'Wolf v. Raband, 1 Pet. 476; Evans v. Gee, 11 I b 80; Sims v. Hundley, 6 How. 1.

Barney v. Baltimore City was decided in 1867. This was a bill in equity for partition; certain persons, citizens of

the District of Columbia, were made parties defendant. Afterwards the bill was dismissed as to them and an amended bill was filed, stating that these parties had conveyed their interest to one Ridgely, a citizen of Maryland. There was also filed in the cause an admission in writing that this conveyance was made without consideration, and for the purpose of conferring jurisdiction on the Federal court, and the grantee had agreed, upon the request of the grantors, to reconvey to them. There was no plea in abatement filed, nor was objection of any kind made to the jurisdiction in the court below, yet this court on appeal considered the evidence and determined that the conveyance to Ridgely was merely colorable, and hence conveyed no real interest, and declined under the circumstances to give effect to what is termed "a fraud on the court and nothing else," and dismissed the bill for want of jurisdiction.

In *Smith v. Kernochen*, this court declined to consider the question of jurisdiction when presented on the merits in the court below and made the ground of error, and yet in Barney v. Baltimore the question of jurisdiction was first considered in this court on a motion to dismiss made here, and on an admission contained in the record, which had nothing whatever to do with the merits, or any issue in the cause so far as the report shows. Barney v. Baltimore was decided before the act of 1875, and the decision rests on the principle that a court possesses the inherent power to protect itself against frauds on its jurisdiction, as is expressly decided in Williams v. Nottawa, 104 U. S. 211, where section 5 of the act of 1875 was first construed. In this last case the distinction between Smith v. Kernochen, and Barney v. Baltimore, is very clearly pointed out, and Chief Justice Waite, in laying down the rule of practice, says:

"Whatever may have been the practice in this particular under the act of 1789, there can be no doubt what it should be under that of 1875. In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties and impose the duty on the court, on its own motion, without waiting for the parties, to stop all

further proceedings and dismiss the suit the moment anything of the kind appears."

The court in this last case declined to say whether, if a defendant allows a case to go on until judgment has been rendered against him, he can take advantage of the objection on error or appeal. Memory v. Hertog presented that question fairly and this court then held he could not.

In *Hawes v. Oakland*, 104 U. S. 450, while it is true the right of Hawes to sue was in question, there was no plea in abatement, nor was the question of jurisdiction presented, but the court being satisfied that the suit was collusive, established rule 94, requiring a stockholder to make affidavit that the suit is not collusive when brought by him upon an alleged failure or refusal of the corporation to act.

Hayden v. Manning, 106 U. S. 586, was an act of ejectment; there was no plea in abatement, and no objection made below to the jurisdiction, and from the report of the case, we do not see how the evidence of a want of consideration in the deed to Manning, the plaintiff, could have been relevant to any issue in the cause, yet it appearing from evidence offered that the conveyance to Manning was without consideration, this court held it was merely an attempt to get a plaintiff who could sue in the Federal court, and dismissed the suit for want of jurisdiction.

In *Detroit v. Dean*, 106 U. S. 537, whether there had been a refusal on the part of the corporation to take action against the city of Detroit was in issue, but whether the refusal was for the purpose of getting a plaintiff who could sue in the Federal courts, so far as the report shows was not involved in the issues on the merits, nor was there any plea presenting this question, and yet this case was dismissed by this court on its own motion.

Farmington v. Pillsbury, 114 U. S. 138, is in strict analogy to the case at bar, and, in principle, we submit, disposes of this question. There, after the question of the invalidity of certain municipal bonds had been determined by the highest court of the State of Maine, Pillsbury collected

some of the bonds and had them transferred to himself under an agreement to collect them, and the bondholders were to receive one-half of the amount collected. There was no plea in abatement, but there was a plea denying that the plaintiff was a *bona fide* holder of the bonds and that they had been placed in his hands merely for collection, and this appearing to the satisfaction of this court, they dismissed the bill for want of jurisdiction. In Smith vs. Kernochen, (7 How., p. 116) in passing on a similar question, Mr. Justice Nelson says :

"The question therefore is one of proper parties to give jurisdiction to the Federal Courts, not of title in the plaintiff. That would be a question on the merits, to decide which the jurisdiction must first be admitted."

And this is the rule which is changed by the act of 1875. Evidence which is made a part of the record, has in every case decided by this court since Barney vs. Baltimore, been considered and made the basis of action under the act of 1875, regardless of its pertinency to the issues presented.

In *Hayden v. Manning*, and Barney v. Baltimore, it could make no difference how the plaintiffs acquired title whether upon a consideration or not, for the conveyances did pass the legal title, and it could not have been made an issue as to whether they were voluntary or not. Between the parties to the conveyances they were effectual to pass title, and that was all the defendants could ask for or require, and the question of consideration was not open, yet in both of these cases this court considered this question, and being satisfied that the conveyances were voluntary and made for the purpose of bringing suit in the Federal courts, they held them to be collusive within the meaning of section 5 of the act of 1875, and dismissed the suits.

In *Briggs v. French*, 2 Sumner, 255, which was relied on by the other side, Judge Story declined to enter into the question of the consideration of a transfer, on the ground that it was good, *inter-partes*, but this case is in direct conflict with Barney v. Baltimore, and Hayden v. Manning.

The case at bar is much stronger; here appellee brought his suit in the State courts of Alabama to recover the identical shares of stock now sued for, alleged in his original bill the identical pledge now alleged, afterwards amended his bill and alleged a pledge at another time. The cause is heard in the courts of Alabama, and the decision being adverse to him he appealed to the highest tribunal in the State where he again had an adverse decision; he applied to this appellate court to modify their decision so as to give him the right to bring another suit for the same stock, and this was refused, and then, conceding that his rights had been finally settled by the highest court in the State of Alabama, he goes to Tennessee for the purpose of presenting his case to the Federal courts on the pledge which he voluntarily abandoned in the State court of Alabama by amendment. Could a clearer case of an attempt to impose on the jurisdiction of the Federal courts be presented? Appellee has not been deprived of any right by the decisions of the Alabama courts of which the Federal courts have peculiar cognizance, and his removal was, so far as the evidence discloses, solely for the purpose of getting into a tribunal where he supposed the decisions of the Supreme Court of Alabama would not be obligatory, and where he could again litigate rights which had been determined in the State courts. It may not have been the *right* of appellant to introduce evidence to show this colorable removal, but the evidence is there in the record, without objection, and being there, it was the *duty of the court sua sponte*, its attention being directed to it, to dismiss the suit. This duty is imposed by the statute, and as is said in Hawes v. Oakland--

"A rigid enforcement of this statute by the circuit courts would relieve them of many cases which have no proper place on their dockets."

Here the motion and suggestion were made before the trial was entered upon, and appellant had not, as was done in Hartog v. Memory, submitted his cause, and after being beaten on the merits, then, for the first time, raised the question of jurisdiction, when, as the record in that case

shows, the facts upon which he relied to defeat it, were peculiarly within his knowledge. In the case at bar, before the trial, appellant made the motion and suggestion, and they were argued by counsel for the respective parties. The attention of appellee was directed to the facts on which appellant relied to support the motion, and he elected to stand on the case as presented, on the ground that there was no issue to which the evidence was pertinent. He can not now complain, if, on these facts, this court shall determine that his removal was not *bona fide*, and that this case is "a fraud on the court, and nothing else."

THE FORMER JUDGMENT.

We shall now discuss the former judgment—on the plea of *res adjudicata*, to which the court below sustained exceptions.

First. By what rule is this court to ascertain what was determined by the State court in the former suit?

Second. What was determined and how far does the former adjudication extend, and what is its effect?

It is conceded that the State court had jurisdiction of the subject matter of that suit; that the property or subject matter, is identical with that described in this; and that the parties are the same, but it is insisted that the fourth element of a *res adjudicata*, the identity of the *cause of action*, is wanting, and hence the decree is no bar to this suit.

We do not regard the technical distinction between the effect of a former judgment, when plead, and when offered as evidence, because the decree was pleaded and also offered as evidence in support of the answer, and whether, technically, the plea is a bar or not, can make no difference, if the former decree has determined the rights of the parties.

It is conceded that the judgment of the State court, if it did determine the questions now litigated, would be conclusive on the Federal courts.

The contention between the parties is,

First, whether the *res adjudicata* is confined to the issues involved, as determined by the pleadings.

Second, whether the principle does not reach further and extend not only to the questions of fact and law which were decided in the former suit, but also to the grounds of recovery which might have been, but which were not presented and,

Third, whether the issues in the former suit embrace the matters now alleged, within either of the rules laid down.

The court below holds that the narrower view is the correct one, and that unless it appears from the pleadings that the issues now made, were expressly made by the pleadings in the former suit, or unless the evidence in this suit would have authorized a recovery on the pleadings in the former suit, that the former judgment is not a bar to this suit.

Again, the court holds that the decree of the State court might have been a dismissal on demurrer for insufficient pleadings, and for this reason the decree is no bar to another suit.

We maintain that the broader is the true rule, and that if appellee failed in the former suit, by reason of omission to bring forward any part of his case from negligence or inadvertence, he is nevertheless concluded by the decree which was an absolute, general dismissal without qualification. That the well established rule in this court is that public policy requires parties who have grievances to be redressed, or wrongs to be righted, when they appeal to the courts to present then their whole case or defense, or failing to do so, to be barred of the right of again vexing the other party.

We insist that the record discloses that the dismissal was not for any defect in the pleadings, but was upon the merits; that the matters now alleged were actually presented and determined by the courts of Alabama, or might have been on the issues presented, and are not now open to appellee.

Now, by what rule shall we ascertain what the Alabama courts decided? The learned judge, when he passed upon the exceptions, limited the rule to the allegations in the pleadings in the cause, and held that where a demurrer is

interposed in an answer, as is permitted under the practice of Alabama, though the complainant has made proof, which would enable him to amend his bill, to meet the ground of demurrer, he is under no obligation to do so, but may present his case on the allegation of his bill without amendment, and upon an absolute dismissal, may maintain another suit for the same property against the same defendant, even though this other suit be based on facts proved in the first —if these facts were not pertinent to the issues made, by the pleadings in the former suit.

"If there was no averment," says the Court, "then no issue, and if no issue, there is no room for proof and no ground upon which an estoppel can rest."

Opinion Bruce, J., Record, p. 143.

Whatever may be the rule declared in some of the decisions, we submit that a uniform, unbroken line of decisions in this court have declared and maintained the broad rule we contend for, and since the principle was established in the decision in Beloit v. Morgan, 7 Wall. 619, from which we have substantially quoted the statement of our proposition, there has been no deviation from it.

If a bill is dismissed generally, it is conclusive on the parties, and, unless words of qualification accompany the decree, "*it is to be presumed to be rendered on the merits,*" and the latest decision of this court seems to make the presumption conclusive.

Freeman on Judgments, § 270.
Durant v. Essex Co., 7 Wall. 109.
Case v. Beauregard, 101 U. S. 692.
Alley v. Nott, 111 U. S. 472.
Lyon v. Perin Manufacturing Co., 125 U. S. 698.
Bigelow v. Winsor, 1 Gray, 297.
Tankersly v. Pettis, 71 Ala. 179.
Borrowscale v. Tuttle, 5 Allen, 377.

This last case is instructive. William Borrowscale had a mortgage on Tuttle's land and filed a bill to foreclose it, requiring an answer under oath. After the defendant had an-

swered, and after the time within which the plaintiff might file a replication and take testimony, and without any notice to the defendant, the plaintiff dismissed his bill. He afterwards transferred his mortgage to G. W. Borrowscale, who filed a bill to foreclose the same mortgage, and Tuttle set up the decree in the other suit as a bar, and the court held that the dismissal of the former suit conclusively determined that the plaintiff's vendor had no right of foreclosure, and that this bound the plaintiff also.

In *Case v. Beauregard*, the principle is stated that when the court has jurisdiction over the subject of the controversy and the equities asserted, it must "be held that the decree dismissing the bill determined the equities of the case."

In *Lyon v. Perin Manufacturing Co.*, the leading authorities are cited, and on p. 702 the rule as stated is affirmed, and this court, quoting from Cooper Eq. Pl. 270, says, "a plea in bar stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing, and if that dismissal is not, in direct terms "without prejudice." We do not contend that where the dismissal is made "because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law," that this is a final determination, for the contrary is conceded in the cases cited, but we do insist that where the decree is absolute in terms, there is a presumption that the decree is upon the merits.

In this last case there was an absolute decree of dismissal, but complainant produced the certificate of the clerk, showing that complainant did not appear, nor was he represented by counsel, but the decree of dismissal was made in his absence on motion of the defendant on complainant's default. The court declined to consider the certificate, and Mr. Justice Lamar disposes of the position as follows:

"This decree on its face is absolute in its terms, is an adjudication of the merits of the controversy, and therefore, constitutes a bar to any further litigation of the same subject between the parties."

And after citing and quoting from Durant v. Essex Co.,

and Bigelow v. Winsor, Cooper Eq. Pl., and Story's Eq. Pl., he concludes :

"The authorities to sustain this view of the case might be multiplied, but those cited are sufficient, and demonstrate the uniformity of the rule."

Lyon v. Perin Manufacturing Co. was submitted for hearing on bill, answer and replication. The decree declared *"that the equities are with the defendant;"* the former case here was submitted on pleading and testimony, and the decree is as follows :

"This cause was submitted for decree at the last term of the court, and held for consideration in vacation on the pleadings and testimony as noted, and on consideration—It is ordered, adjudged, and decreed that complainant is not entitled to relief, and that this bill of complaint be and the same is hereby dismissed out of this court." Record, p. 26.

In the opinion delivered in the court below will be found the following :

"It may be said, however, that the proof necessary to sustain the bil in the present case would have (been) pertinent to defeat the defense of the statute of limitations and the application of the doctrine of laches in the former suit in the State court; but upon what issue would such proof have been pertinent in that cause, and did the complainant tender an issue in his bill upon which such evidence could have been properly received."

Opinion Bruce, J., Record, p. 43.

We respectfully submit that the fallacy of the position is apparent when considered in the light of the authorities. In a court of equity there is always an issue on staleness, lapse of time and laches, whether they are pleaded or made matter of defense by way of demurrer, and it is incumbent upon the complainant, when he asks relief after the lapse of much time, to explain the delay.

"A court of equity," said Lord Camden, "has always refused its aid to stale demands, where the party has slept on his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." Smith v. Clay, 3 Bro. Ch. 640 note.

"This doctrine," says this court in Spiedel v. Hen-

rici, 120 U. S. 387, "has been repeatedly recognized and acted upon here." Citing Pratt v. Vattier, 9 Pet. 205; McKnight v. Taylor, 1 How. 161; Bowman v. Wathen, 1 How. 189; Wagner v. Baird, 7 How. 234; Badger v. Badger, 2 Wall. 87; Hume v. Beale, 17 Wall. 336; Marsh v. Whitmore, 21 Wall. 178; Sullivan v. Portland and Kennebec Railroad, 94 U. S. 906; Godden v. Kimmel, 99 U. S. 201." Since this decision in Speidel v. Henrici, this court has again affirmed the doctrine in Richards v. Mackall, 125 U. S. 187.

The principle asserted is of universal application in courts of equity, and has always been asserted in the courts of Alabama.

Johnson v. Johnson, 5 Ala. 90.
James v. James, 55 Ala. 533.
Nettles v. Nettles, 67 Ala. 601.
Gilmer v. Morris, 80 Ala. 78.

The decision of the Supreme court of Alabama in the former case shows that the decree of the chancellor was sustained because the claim was stale and the complainant had been guilty of laches.

In the opinion delivered by Mr. Justice Somerville will be found the following:

"The bill was, on the hearing of the cause, dismissed by the chancellor as barred by the lapse of time, and the complainant brings this appeal.

It is our opinion, after very careful consideration of the law and facts of the case, that the bill was wanting in equity as an attempt to enforce a stale demand, and that the decree was free from error." Record, p. 28.

And the doctrine of staleness and laches is thus stated by him:

"It may be, as often said in the text books, that, strictly speaking, that statute of limitations does not run against a pledgor, in an ordinary case of pledge, unless there is shown to be an adverse possession by the pledgee, brought home to the knowledge or notice of the pledgor. But staleness of demand, which is a defense peculiar to courts of equity, rests on another, though no doubt analogous principle, which is to visit on one who sleeps on his rights, the fruits of his own negligence and infirmity of purpose.—2 Story's Eq. Jur., § 1884. The doc-

trine of staleness may properly be said to be "founded in its origin upon a sound public policy, which has a just regard for the preservation of the peace of society. It is of the utmost moment that there should be some end to law suits, an unreasonable encouragement of which is disastrous to the welfare of any government. Hence, reasonable diligence in the assertion of one's rights in the courts is properly exacted, not less than the exercise of conscience and good faith." Record, p. 28.

After discussing the law and facts of the case the learned justice says:

"Upon this state of facts, we hold that the complainant's right of redemption was a stale demand, and must be deemed to have been barred by unreasonable delay in its assertion. Sleeping on his rights for so great a length of time constitutes a degree of *laches* fatal to their enforcement." Record, p. 31.

The defense of *laches* and staleness was set up in the first suit by answer and demurrer. (§§ 11 and 12. Answer Josiah Morris. Record, p. 17,) by answer and demurrer, (Amended answer Josiah Morris. Record, pp. 22, 23); and again by his second amended answer. Record, p. 24.

The Supreme Court of Alabama has decided that the defense of acquiescence and staleness need not be pleaded as a defense, but the court will refuse relief when they appear.

In *James v. James*, 55 Ala. 533, it is said:

"Acquiescence, unreasonable delay is not, like the statute of limitations, a special defense which must be pleaded to be available. It arises on the pleadings and proofs, and the court acts upon it, because the party affected by it does not bring himself within the principles on which the right to relief is founded."

Citing Fisher v. Roody, 1 Curtis 219.
Badger v. Badger, 2 Wall. 87.
This doctrine and case are affirmed in—
Nettles v. Nettles, 67 Ala. 601.
Gilmer v. Morris, 80 Ala. 78.
See also Johnson v. Johnson, 5 Ala. 90.

The decisions of this court and the Supreme Court of Alabama leave no doubt about the soundness of the position we contend for, and declare it to be the duty of a complainant to account for delay, whether it is made matter of defense or not, and do not leave it with the complainant to determine whether he will do so, or not. For if the rule

was as contended for by appellee, *laches* and staleness would not only be no defense, but would really be the means of enabling a party to speculate with one court, and then present his case on the same proofs after defeat, to another, by amending his pleadings, and calling it a new case. The learned and industrious counsel have failed to discover any case which even gives color to the proposition, that after the absolute unconditional dismissal of a bill in equity on pleadings and testimony, on the hearing, on the ground of laches, or staleness, whether pleaded or not, a complainant may file another bill against the same defendant, for the recovery of the same property or subject-matter, as was embraced in the first suit.

Badger v. Badger, 2 Wall. 87, is the leading case, and the principle there decided is thus stated in *Marsh v. Whitmore*, 21 Wall. 185. :

"The party," says this court in Badger v. Badger, (2 Wallace, 95.) citing from previous decisions, "who appeals to the conscience of the chancellor in support of a claim, where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse rights, should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fradulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

In *Harwood v. Railroad Co.* 17 Wall. 81, this court says :

"Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery, must depend upon the particular circumstances of each case."

And held that the complainant, in a bill filed to set aside a decree, five years after its rendition, was called upon to show why it was not filed sooner.

In *Sullivan v. Portland & Co. Railroad*, 94 U. S. 811, this court said :

"To let in the defense that the claim is stale, and that the bill can not, therefore, be supported, it is not necessary that a foundation be laid by any averment in the answer of defendant. If the case, as it

appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief."

In *Brown v. County of Buena Vista*, 95 U. S. 160, 161, it is said, after holding that the statute of limitations did not apply:

"But a court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual, is a question to be resolved by the sound discretion of the court." * * * The law of laches, like the principle of limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory of witnesses, the muniments of evidence, and other means of proof. The rule which gives it effect is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

The principle is again stated and reaffirmed in Hayward v. National Bank, 96 U. S. 617; Speidel v. Henrici, 120 U. S. 387, and Richards v. MacKall, 124 U.S187.

If the defense of staleness and laches will thus always be considered by the court, and the complainant was bound to show why he delayed in prosecuting his claim, how can it be successfully maintained, that this was not an issue in the case made by the pleadings in the former suit, and how can appellee avoid the obligation imposed upon him, to allege and prove his case.

The bill, in the first suit, alleged a pledge in 1871, thirteen years before the bill was filed, appellee offered the same evidence he now relies on to meet the defense of staleness and laches, argued in the State court, that he had met it, was beaten on this issue, appealed to the highest court in the State, and was again beaten; applied to the State court for a rehearing and modification to prevent the decree from barring another suit, and in response to that application, the State court of last resort held:

"*There is neither averment or satisfactory proof of any recognition on defendant Morris' part of any existing trust relation between himself and the complainant between the times of the original transaction and the filing of the bill.*"

Opinion of Mr. Justice Somerville, Record, p. 27.

Unless the court is prepared to hold that laches and staleness, when made the basis of decision, on the hearing on pleadings and testimony, are no bar to another suit, for the same subject-matter between the same parties, we submit that the former decree is conclusive on appellee here. The authorities we have cited, we submit, even if the narrow rule prescribed by the court below could be true, settle two propositions:

First. The absolute dismissal of the first bill on the hearing, was a dismissal on the merits.

Second. That staleness and laches were within the issues made by the pleadings.

But we insist that the broader rule is the true one, and the duty is imposed on a party to present his whole case or defense, and the *res adjudicata* extends not only to what was litigated, but to all matters touching the same subject, which the parties might, and ought to have litigated. The rule is stated in *Tankersly v. Pettis*, 71 Ala. 186:

"The inquiry is not, what the parties actually litigated, but what they might and ought to have litigated in the former suit."

And this court in *Beloit v. Morgan*, 7 Wall. 622, in declaring the effect of a former judgment between the same parties, says:

"A judgment is conclusive not only as to the *res* of that case, but as to all further litigation between same parties touching the same subject matter, though the *res* itself may be different. * * * * * * But the principle reaches further. It extends not only to the questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented."

That if the bill in the former suit failed to present appellee's case fully, the duty of amendment rested upon him, and if he failed to amend, he is, notwithstanding any defects, debarred from again litigating what he might have there litigated. We further insist that even if the matters now litigated were not strictly within the issues made by the pleadings, still if they were actually litigated by the parties, and were heard and determined by the court in the former suit, this

determination is conclusive, and in order to ascertain what was litigated the court may go outside of the record proper and examine briefs of counsel.

That if it were true, as insisted by appellee, that the bill in the former case was dismissed on demurrer, this is a decree on the merits, and conclusive on the parties.

In *Beloit v. Morgan*, 7 Wall. 622, this court quotes the opinion of the vice chancellor in Henderson v. Henderson, 3 Hare, 115:

"That when a given matter becomes the subject of litigation in and of a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of the case.

"The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at that time."

And this was made the rule of decision.

In *Aurora City v. West*, 7 Wall. 102, this court says:

"Courts of justice, in stating the rule, do not always employ the same language; but where every objection urged in the second suit was open to the parties within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed in *rem judicatam*, and the former judgment in such a case is conclusive between the parties."

In this case Mr. Justice Miller dissents and says, p. 106:

"The rule is, that when a former judgment is relied on, it must appear from the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided. * * * * * * The opinion just read asserts a different rule, and insists that whatever might have been fairly within the scope of the pleadings, in the former suit, must be held as concluded."

This decision, as thus construed, has been affirmed and followed by a long line of decisions in this court, and the principle has been enlarged in the interest of that public policy "that there should be some end to litigation, that

when a matter has once been heard and determined in one court it shall not be subject to re-examination in another court between the same parties."—Miles v. Caldwell, 2 Wall. 43.

In *Cromwell v. County of Sac*, 94 U. S. 358, the rule stated in Henderson v. Henderson is again quoted and affirmed, but the court there holds that where the second suit is upon a different cause of action from the first the former judgment is only conclusive as to the matters actually determined therein.

In *Case v. Beauregard*, 101 U. S. 688, complainant, a creditor, filed a bill to follow certain partnership effects, but did not allege that he had obtained a judgment. This bill was dismissed. Complainant filed a new bill to subject the same property, alleging that he had issued execution and had a return of no property; the defendant relied on the former decree of dismissal. On appeal, this court says, p. 692:

"We regarded the case and treated it as requiring an adjudication upon the complainant's equity to be paid out of the property in the hands of the railroad company. Nothing that can now be done in another suit can take away the legal effect of the decree. Even were we of opinion that the case was erroneously decided, it would still be *res adjudicata*, a bar to the complainant, a protection to the defendants."

In *Life Insurance Co. v. Bangs*, 103 U. S. 780, a suit at law was brought upon an insurance policy. The company filed answers setting up that the policy was procured by fraudulent representations, which answers were afterwards withdrawn. Pending this suit the company filed a bill to cancel the policy and obtained a decree for its cancellation, which decree they pleaded as a defense to the suit at law, but on demurrer it was stricken out, on the ground that the court which rendered the decree had not acquired jurisdiction of the persons, and rendered judgment for the plaintiff. The company then filed the bill, in the case reported, to cancel the policies and enjoin the collection of the judgment, and the judgment at law was relied on as a bar to this second bill. This court, upon this point, says, p. 782:

"The judgment, in the action at law, was a bar to this suit. Its recovery concluded all matters which might have been urged as a defense to the policies. A fraudulent purpose in procuring them, subsequently carried into execution, would have been a good defense. It was in fact originally pleaded and afterwards withdrawn. Its withdrawal did not authorize a suit in another forum for its establishment against the demand of the plaintiff. When an action at law is brought upon a contract, the defendant, denying its obligation, either from fraud, payment, or release, or any other matter affecting its original validity, or subsequent discharge, must present his defense for consideration. A recovery is an answer to all future assertions of the invalidity of the contract by reason of any admissible matter which might have been offered to defeat the action. The contract is merged in the judgment."

Louis v. Brown Township, 109 U. S. 162 and

Bissell v. Spring Valley Township, 124 U. S. 225,

are to the same effect.

This is the universal rule and authorities might be multiplied indefinitely.

In *LeGuen v. Gouverneur*, 1 Am. Dec 121, (John Cas. 436) the New York Court of Errors declare the rule to be that the former judgment

"Is not only final as to the matters actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided."—See page 126.

And Chancellor Kent, in an opinion delivered by him in the same case, on page 134–5, says there are but two exceptions to this rule:

1st. Where there are mutual dealings and defendant fails to set up his counter demand; and

2d. In actions of ejectment, where a title is omitted to be brought forward.

He then says:

"The general rule is intended to prevent litigation and to preserve peace, and were it otherwise men would never know when they might repose in security on the decisions of courts of justice; and judgments might cease to be revered as being no longer the end of controversy and the evidence of right.

In *Benjamin v. Elmira, &c., R. R. Co.*, 49 Barb. 441, certain trustees, under a deed of trust, had, in a former suit, filed a bill to foreclose the mortgage upon the railroad and its property—the plaintiffs in the reported case had been

made a party defendant in the former, upon an allegation that they claimed a lien as a judgment creditor. In that cause a decree was rendered holding that the lien of the deed of trust was superior to that of the judgment. Plaintiffs afterwards filed a bill to foreclose a chattel mortgage which had been held by them at the time of the decree in the former case, claiming that such mortgage was a superior lien on part of the property, and alleging that it had not been set up or passed upon in the former suit. The court held that the decree in the former suit was a complete bar, saying :

"It matters not what their liens were; they had an opportunity to set them up and litigate the question in that suit. It is of no consequence that the plaintiffs made them thus parties as judgment creditors and in ignorance of their chattel mortgage.

In *Griffin v. Long Island R. R. Co.*, 102 N. Y. 452, the court of Appeals of that State declare that a former judgment is conclusive—

"Not only as to the matters actually determied, but as to every other matter which the parties might have litigated and have decided as incident to or essentially connected with the subject-matter of the litigation within the purview of the original action, either as a matter of claim or of defense."

In *Lee v. Kingsbury*, 13 Tex. 68, (62 Am. Dec. 546,) Lee and wife had conveyed a half interest in a lot of land by a deed to Kingsbury; they filed a bill to redeem, alleging that the deed was intended as a mortgage. This Kingsbury confessed and obtained a decree of foreclosure. Under this decree and an execution issued thereon, the entire lot was sold and bought by Kingsbury, and he brought an action to recover it. The Lees pleaded to this action that the lands were the separate estate of the wife and her home stead. The Supreme Court of Texas held these matters might have been litigated in the foreclosure suit, and as they were not, the parties were forever precluded from litigating them again.

In *Hall v. Foreman*, 81 Ky 505, 508, The rule is thus stated: "the judgment of a court of competent jurisdiction is not only final as to all matters determined by it but as

to every other matter incident to the cause or properly belonging to the subject of litigation and which the parties might have put in issue and had determined." See also

Davis v. Tallcot, 12 N. Y. (2 Ker.) 184.
Doak v. Wiswell, 33 Me. 355.
The People v. Smith, 51 Barb. 360.

The last is also a strong case in support of the proposition that plaintiff is estopped from asserting in this case that the pledge of 1871 had been extinguished and merged into that of 1875. See, also,

Hanna v. Read, 102 Ill. 596.
Tilley v. Bridges, 105 *Ib.* 339.
Morris v. Curry, 41 Ark. 75.
Jones v. Terry, 43 *Ib.* 230.
Goodenow v. Litchfield, 59 Iowa—Opinion on rehearing, p. 235.
1 Herman on Estoppel, &c §§ 122-3-4-5.

"A judgment decides every matter which pertains to the cause of action"—the right to redeem in this case—" or which is involved in the measure of relief to which the cause of action entitles the party, *even though such matter may not be set forth in the pleading.* This principle not only embraces what actually was determined, but also extends to every other matter which under the issue the parties might have litigated in the case, to *everything within the knowledge of the parties which might have been set up as a ground of relief or defense.*" *Ib.* § 125.

Fischli v. Fischli, 1 Blackford, 360.
Bates v. Spooner, 45 Ind 489.
Ulrich v. Drischell, 88 *Ib.* 358.
Railroad Co. v. Ins. Co., 81 *Ib.* 239.
Kelly v. Donlin, 70 Ill. 378.
Ruegger v. I. & St. L. R. R. Co., 103 *Ib.* 449.
Hamilton v. Quinby, 46 *Ib.* 90.
Shenandoah Valley R. R. Co. v. Griffith, 76 Va. 913, 925.
Petersine v. Thomas, 28 Ohio St. 596.
Malley v. Malley, 52 Iowa, 654–55; *Ib.* 179.
Thompson v. Myrick, 25 Minn. 4.
Preble v. Board of Supervisors, 8 Biss. 358, 361.
Hamea v. Scott, 84 Ind 71.
State v. Krug, 94 Ind. 366.
Elwood v. Blymer, 100 Ind. 504.
Bennett v. Star Mfg. Co. 119 Ill. 9.

The decisions of the Supreme Court of Alabama are in harmony with those cited.

Chamberlain v. Gaillard, 26 Ala. 509.
Waring v. Lewis, 55 Ala. 623.
Tankersley v. Pettis, 71 Ala. 179.

Waring v. *Lewis* was a bill filed by minors to open a settlement made by the Probate Court and impeach the accounts of an administrator. The complainants were represented, and all proper parties were before the court, after notice given in the manner prescribed by law.

"Of every fact now urged in impeachment of the accounts," says the Court, p. 623, "stated and allowed by the court, and of the decree rendered, the court then had full jurisdiction. All were in that court fit subjects of litigation and are necessarily involved in the decree pronounced."

In *Tankersley* v. *Pettis*, a bill was filed against Tankersley as administrator to compel a settlement of his administration. A former bill for a like purpose had been filed by appellee and her brother and was, by the court of chancery on a hearing on pleadings and evidence, dismissed absolutely and unconditionally, and this decree was relied on as a bar to the second suit. It was there contended, as now, that the issues in the two cases were not the same After holding that an unconditional dismissal is presumed to be on the merits, the court says, p. 186:

"When, as in the present case, there is no question as to the jurisdiction of the court, or as to the identity of parties, the inquiry, whether the subject matter of the controversy has been drawn in question, and is concluded by a former adjudication is determined when it is ascertained that the matters of the two suits are the same, and the issues in the former suit were broad enough to have comprehended all that is involved in the second suit. The inquiry is not, what the parties actually litigated, but what they might and ought to have litigated in the former suit. For the bar of a judgment or decree, if litigation is quieted and parties are not twice vexed for the same cause, must extend to all facts which are necessarily involved in the issue. The main, controlling issue in the former suit as in the present suit, was the liability of the appellant to account for his administration of the estate of the elder Pettis. All other matters involved in the former suit were the mere incidents of this liability. We do not inquire whether the former bill was skillfully drawn, presenting the liability of the appellant in the most appropriate form. A party cannot obviate the force and effect of a judgment against him, by invoking his negligence or unskillfulness in pleading, when that is not the ground of judgment. The right of the appellee, as heir and distributee, to a settlement of the administration, the liability of the appellant as administrator to account to her, were distinctly presented. There was no matter connected with her right, or with the liability of the appellant, which could not have been litigated in the for-

mer suit. If the former bill was, as is now insisted, so defective in its frame that the appellee could not have obtained full relief, the duty of amendment rested upon her. To suffer her to speculate on the chances of obtaining a favorable decree on insufficient pleading, and after an adjudication against her on the merits, to assail it because of the insufficiency of the pleading, would be manifestly unjust, and would encourage negligence and protracted litigation. A judgment is conclusive of the entire subject-matter of controversy, of all that properly belongs to it—of all that might and ought to have been litigated and decided."—Wells' *Res Adjudicata*, Par. 248-9.

Ruegger v. *I. & St. L. R. R. Co.* 103 Ill. 449, is directly in point. A bill was filed in the Federal Court in Illinois, by the I. & St. L. R. R. to enjoin the collection of certain taxes assessed against it, and was dismissed on the merits on a hearing. A new bill was filed by the same Company to enjoin certain taxes levied on the St. L. A. & T. H. R. R. Co., which was leased by it. It was insisted that the two taxes were different and hence the issues in the two cases were different, but says the court, p. 457.

"We do not regard this point well taken. The taxes sought to be defeated are the same in each suit. The testimony offered in each case shows but one assessment—one valuation for the same years—the same tax schedules and the same identical tax in question in each case. It is true a reason is urged to defeat the tax in this case which was not urged in the other case but that cannot affect the question. The court, in the case in the Circuit Court of the United States, had jurisdiction of the parties and of the subject matter, and the complainant was bound to bring forward every objection that existed to the validity of the tax, and if he failed to do so he cannot, in a subsequent suit, urge an objection which he might have insisted upon in the former action.

And it has been held that an assignee in bankruptcy who failed in a suit because he could not prove an act of bankruptcy sufficiently early, could not afterwards maintain an action for the same demand, though he secure evidence, for want of which he suffered the former defeat.

Says Best, C. J.:

"I think the plaintiff can not recover in a second action what he might have recovered in the first. He had the evidence and it would be vexing the defendant to suffer a second action to be brought.

Stafford v. Clark, 1 Car. & P. 403.

And where a defendant defeats a recovery on the erroneous ground that the cause of action had not then accrued, this judgment was held conclusive.

Morgan v. Plumb, 9 Wend. 287.

Where the right or title relied on in the subsequent suit has been passed upon in a prior suit, the judgment is conclusive, whatever may be the form of the subsequent action. S. & N. R. R. Co. v. Henlein, 56 Ala. 368, is directly in point.

"It results from these authorities that an adjudication by a competent tribunal, is conclusive, not only in the proceeding where it is pronounced, but in every other where the right or title is the same, though the cause of action may be different."

2 Smith's Lead. Cases,(7th Am. Ed.)788, 789.
Aurora City v. West, 7 Wall. 96.
Outram v. Morewood, 3 East, 346.

To ascertain whether such former judgment is to a bar to a second suit it must appear, not necessarily by the record, but it may be shown by proof *aliunde*, if the record does not show it, that the matters proposed to be tried in the second suit were determined by the first trial, or could have been, so that in every plea of *res adjudicata*, if the record does not show what matters were passed upon, it is competent for the party relying on the judgment or decree to show by evidence, *de hors* the record, what matters were litigated.

In *Washington Steam Packet Company* v. *Sickles*, 24 How, 333, the direct question is presented and decided, and Mr. Justice Campbell, in answer to the contention of the plaintiff that the record was the only evidence on pp. 343 and 344 says.

"A system of general pleading has been extensively adopted in this country, which rendered the application of the principle contended for by the plaintiffs impracticable, unless we were prepared to restrict within narrow bounds the authority of the *res adjudicata*. It was consequently decided that it was not necessary as between parties and privies that the record should show that the question upon which the right of the plaintiff to recover, or the validity of the defense, depended for it to operate conclusively; but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury.

In Young v Black, 7 Cr. 565. this Court admitted in evidence a record of a former suit between the parties, in which judgment was rendered for the defendant, supported by parol proof that the cause of action in the two suits were the same, the Court say: "The controversy had passed in *rem judicatam*; and the identity of the causes of action being once established, the law would not suffer them again to be drawn into question." The cur-

rent of American authority runs in the same direction.—Wood v. Jackson, 8 Wend. 9; Eastman v. Cooper, 15 Pick. 276; Marsh v. Pico, 4 Rawle. 288; Green. Ev. section 531.

And in *Miles* v. *Caldwell*, 2 Wall. 35, which was a bill in equity to quiet titles, and the defendant relied on a judgment in an action of ejectment between the plaintiff and himself as a bar, Mr. Justice Miller says pp. 39, 43:

"It is a general rule, growing out of the concurrent jurisdiction of the courts of law and chancery over this subject, as well as a variety of others, founded also upon the principle that it is the interest of the public, that there should be some end to litigation, that when a matter has once been heard and determined in one court, it shall not be subject to re-examination in another court between the same parties."—p. 39.

"We are of opinion that the prevailing doctrine of the courts at present is, that whenever the form of the issue in the trial relied on as an estoppel is so vague that it does not determine what questions of fact were submitted to the jury under it, it is competent to prove by parol testimony what question or questions of fact were before the jury, and were necessarily passed on by them.—p. 43.

And this principle has been applied to cases where the second suit is upon a different demand arising out of the same transaction.

As in the case of an action on one of several coupons of the same issue where evidence was admitted to show that the plaintiff in the second suit, though not a party to the first, was really the owner of the coupons.

Cromwell v. County of Sac., 95 U. S. 351.

Or on one of several promissory notes given at the same time, as in

Davis v. Brown, 94 U. S. 423.

Or in an action for an installment of wages, as in

Strauss v. Meertief, 64 Ala. 299.

This rule has been established in Alabama for a long time.

Robinson v. Windham, 9 Port. 397.

Davidson v. Shipman, 6 Ala. 27.

Rake v. Pope, 7 Ala. 161.

Waring v. Lewis, 53 Ala. 615.

Haas v. Taylor, 80 Ala. 459.

And being a well settled rule of evidence in the State courts would be binding here.

The rule as to the admissibility of evidence is the same in all these cases, but the distinction drawn by Mr. Justice

Field in Cromwell v. County of Sac, as to the effect of proof in the two classes of cases must not be lost sight of. When the second action is based upon the same demand as the first, the judgment in the first suit is a bar as to all matters which were, or might have been presented or litigated in the first suit, when the second action is between the sam parties upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted upon the determination of which the finding or verdict was rendered.

And this rule has been extended in the comparative recent decisions of Corcoran v. Canal Co., 94 U. S. 741, and Louis v. Brown Township, 109 U. S. 162.

In Corcoran v. Canal Co., this question was passed upon by this court, whether a matter which was determined in the cause, was conclusive as between defendants between whom no issue thereon was raised by the pleadings, and was *res adjudicata* as between them, and it was held, that where it appeared outside of the pleadings that the issue was fairly made and was argued by counsel, as shown by their briefs on file it was conclusive.

Mr. Justice Miller, delivering the opinion of the court, says, pp. 744, 745:

"It is said that Corcoran and his co-trustees, the canal company and the State af Maryland, were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.

"The answer is that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree. It is to be observed, also, that the very object of that suit was to determine the order of the distribution of the next revenue of the canal company, and that the Corcoran trustees were made defendants for no other purpose than that they might be bound by that decree. And, lastly, as the decree did undoubtedly dispose of that question, its conclusiveness can not be assailed collaterally on a question of pleading, when it is clear that the issue was fairly

made and was argued by Corcoran's counsel, as is shown by the third head of their brief, made a part of this record by stipulation."

And in Louis v. Brown Township, this court affirmed its former decision and hold that though no issue is raised by the pleadings, and there are no adversary proceedings, yet, if the issue was decided and parties had an opportunity to be heard, the decree is conclusive as to all matters determined therein. There was a cross-bill filed in the case, the decision of which, was relied on as a bar, but it was expressly decided that if there had been no cross-bill it would not affect the conclusiveness of the former decree, the plaintiff's assignor having been a defendant in that suit, and having had an opportunity to be heard on the question presented in the suit.

These two last cases are not cited to show that decrees may be made between co-defendants on issues raised by the pleadings, as stated by counsel below, but to establish the proposition that the court will look outside of the record to ascertain whether a particular matter was determined, and if it appears that the question was presented, that parties have had a hearing on it and an opportunity to present their rights, they are concluded by a decree so far as it affects the rights presented and passed upon. It is now contended, for appellee, that as the pleadings are in writing, the court cannot go outside of them to determine te question decided in the former suit, and they further insist that because the defence of the statute of limitations was interposed by demurrer, the case was disposed of on the demurrer.

In order to determine this question, we think, under the rule laid down in these two cases, it was competent to examine the briefs of counsel filed in the State court, to show that the issue was fairly made and argued, by appellee's counsel on the testimony.

In Merchants, etc., Line v. Lyon, 4 McCreary, 145, the admission of counsel was held admissible, and sufficient to show upon what matters evidence was introduced, and went

to the jury on the former trial and to determine whether the question raised in the second suit was litigated and determined in the first.

But it is insisted that the dismissal in the State court was upon demurrer, and that complainant had a right to take the opinion of the court on his case, as he chose to present it and the dismissal, though absolute, would be no bar to a new bill for the same subject matter, against the same parties, because the record of the former action shows the demurrer did not extend to the disputed facts involved in the second suit, and because this subsequent suit does not present the same questions as those determined in the former suit. Appellee also insists that the former judgment is not conclusive as to any matters involved in this suit, except as to the precise questions actually litigated and determined in the first trial. The proposition of appellee are identical with those made in this court, in Aurora City v. West, 7 Wall, on page 95. In that case, on page 99,

"Since the resolution in Ferrer's case," (6 Reports 7), says this court, "the general principle has always been conceded, that when one is barred in any action, real or personal, by judgment or demurrer, confession or verdict, he is barred as to that or the like action of the like nature for the same thing forever."

The opinion, then, proceeds with a discussion and review of all the authorities, and this court holds that neither of these propositions is sound.

The recent decision of this court in *Bissell v. Spring Valley Township*, 124 U. S. 225, hardly leaves anything further to be said on this subject for appellant.

In this last case, the question was fairly presented, as to the effect of a judgment upon demurrer, where that judgment goes to the merits of a cause, and the caseof Cromwell v. Sac, 94 U. S. 351, was relied upon by plaintiff to sustain his action. This court, in this case, expressly held that the judgment in the former case operated as an estoppel against the plaintiff's bringing another action, even upon different coupons, although the alleged facts which would have cured the defects in the first suit, had they then been alleged.

Mr. Justice Field, in delivering the unanimous opinion of the court, draws a very clear distinction between the effect of judgment upon demurrer, where the demurrer merely goes to the form of the pleading, and judgment upon demurrer where it goes to the merits of the cause. In the opinion, he says:

"That if the facts admitted by demurrer had been found by a jury, or had been admitted in open court by the plaintiff, there could be no question that the judgment rendered thereon would be conclusive in another action."

But he goes further and shows clearly the distinction which we have undertaken to show in this case. He says on page 232:

"Is the litigation any the less concluded because the fact upon which the judgment rested was established by the demurrer? There are undoubtedly many cases where a final judgment upon a demurrer will not conclude as to a future action. The demurrer may go the form of the action, to a defect of pleading, or to the jurisdiction of the court. In all such instances the judgment thereon will not preclude future litigation on the merits of the controversy in a court of competent jurisdiction upon proper pleadings."

It is when the judgment goes to the form of action, to a defect of pleading, or to the jurisdiction of the court, that the cause can be tried over again in a court of competent jurisdiction upon proper pleadings, but it is only in such a case, for he says, further, "And it has been held that where a demurrer goes to both defects of form, and also to the merits, a judgment thereon, not designating between the two grounds, will be presumed to rest upon the former. But where the demurrer is to a pleading setting forth distinctly specific facts touching the merits of the action or defense, and final judgment is rendered thereon, it would be difficult to find any reason in principle why the facts thus admitted should not be considered for all purposes as fully established as if found by a jury or admitted in open court. If the party against whom a ruling is made on a demurrer wishes to avoid the effect of the demurrer as an admission of the facts in the pleading demurred to, he should seek to amend his pleading or answer, as the case may be. Leave for that purpose will seldom be refused by the court upon a statement that he can controvert the facts by evidence which he can produce. If he does not ask for such permission, the inference may justly be drawn that he is unable to produce the evidence, and that the fact is as alleged in the pleading. Courts are not established to determine what the law might be upon possible facts, but to adjudge the rights of parties on existing facts; and when their jurisdiction is invoked, parties will be presumed

to represent in their pleadings the actual, and not supposable, facts touching the matters in controversy."

This declaration of the principle we contend for is so clear that to our minds it is conclusive of the case at bar.

That judgment on demurrer is conclusive has been held in.

Dixon v. Ladek, 59 Tex. 529.

Francis v. Wood, 81 Ky. 16.

In *Underhill v. Mobile, etc., Insurance Co.*, 67 Ala. 45, a bill was filed to compel the transfer of certain stock, which it was alleged had been pledged to it and wrongfully converted, the defendant interposed a demurrer of the statute of limitations, which was sustained and the bill dismissed in the court below. On appeal it was contended that the case was withdrawn from the operation of the statute because it appeared on the face of the bill that there was no one entitled to sue, but the court held that the time of the appointment of the special administrator was not stated, nor was the time of his death averred.

"The appellant can derive no benefit from the omission of these averments. The intendments and presumptions are that he has stated his case as strongly as the facts will justify, and that the averment, of the time and duration of McGuire's appointment, would not have aided him, or it would have been stated."

We insist the pleadings and record and the opinions of the Chancellor, of Chief Justice Stone and of Associate Justice Somerville of the Supreme Court of Alabama, show conclusively that there is no color for the proposition that the former bill was dismissed upon demurrer.

To the original bill the defendent Morris filed an answer, and after denying complainant's right to the stock set up the statute of limitations in his answer, and as is permitted under the practice in the Alabama Chancery Courts, also set up the same defense and staleness by way of demurrer in this answer.

Paragraphs 11 and 12 of the original answer are as follows:

11. This respondent, as a defense to the matters alleged in said bill,

saith, that the said shares of stock had been his own absolute property against the complainant from the 30th of December, 1871, until the 23d of April, 1881, when he sold the same, and against the whole world, from the 30th of March, 1875, to the time of said sale, and avers that the claim set up in complainant's bill is barred by the statute of limitations.

12. And this respondent demurs to said bill because:

(1.) The facts alleged show, that the demand is stale and barred by the statute of limitations.

Record, p. 17.

The answer of Josiah Morris to the amended bill denies the right of complainant to the stock, and in this answer under the rules of practice, is also set up laches and the statute of limitations by way of demurrer.

Record, p. 22.

In his amended answer the defendant, Morris, after again denying complainant's right to the stock, says:

"And it was the duty of the complainant, if entitled to a reconveyance of said stock, to demand such reconveyance within a reasonable time, to-wit: Within six years from the said 30th March, 1875, from this respondent; and respondent avers that said stock being speculative in its character became greatly depreciated in value, to-wit, of the value of less than $20 per share, and said complainant not only failed and neglected to request or demand a reconveyance of said stock to himself within a reasonable time as aforesaid, but said complainant abandoned all claim to said stock, and never set up any claim to the same or made any request or demand for the reconveyance thereof to himself, for a long period, to-wit, until the filing of the original bill in this cause or about that time."

Record, p. 24.

Proofs were then taken. Complainant proved the identical pledge now relied on.

We give herewith the testimony of complainant and his father in the trial of the case in the State court, and their evidence in this cause as to the alleged pledge in 1875:

TESTIMONY OF J. N. GILMER IN STATE COURT.

To the 7th interrogatory, he saith: I think some time in the spring of 1875 my stock was levied upon under an execution on a judgment against my firm, Gilmer, Browder & Co., for some $230.00. Mr. Morris paid this amount. The stock was then standing in my name on the books of Elyton Land Company, and was levied on as my stock. I requested Mr. Morris to pay the judgment and to have the stock transferred on the books of the company to him, and to hold the same as security for that amount and any other amount I might be due him. This was done.

Dep. J. N. Gilmer. Record, p. 182.

TESTIMONY OF J. N. GILMER IN THIS CAUSE.

Q. State if anything occurred between you and Mr. Morris in 1875 in reference to that stock?

A. I was notified by my father that my stock had been levied upon under an execution of a judgment, in favor of one Mr. Farley, for the sum of $230. My father called on Mr. Morris and asked him to pay it up and to hold such judgment and have my stock transferred to him as collateral security for this indebtedness and any other indebtedness that I might be due him.

Q. Tell me how you know your father did that?

A. Because he told me of it himself.

Q. Who told you?

A. My father did.

Q. Is that the only way you know?

A. No, sir, Mr. Morris asked my father to ask me to come to see him. I called on Mr. Morris and stated that my father said he wished to see me in reference to the payment of this judgment, and that he had agreed with my father to pay this judgment and have the stock transferred to him upon the books of the Elyton Land Co., and to hold such judgment and the stock as a collateral security for that indebtedness, and any other indebtedness I might be due him.

Q. You say Mr. Morris agreed to that?

A. Yes sir.

Q. When was that, now?

A. I think it was in the spring of 1875—about March, 1875.

Dep. J. N. Gilmer. Record, p. 90.

TESTIMONY OF F. M. GILMER IN STATE COURT.

To the 7th interrogatory, he saith: Some time, I can't remember the date, I heard that the stock had been levied on, under an execution in Jefferson county, against said J. N. Gilmer, as his property. And knowing that there was no redemption of personal property, I met Mr. Morris and informed him of the fact, and asked him to see my son, said J. N. Gilmer, and get him to transfer the stock to him, Morris, as security for the amount of the judgment, and also as collateral security for any other indebtedness of my said son to him. My son was doing business with Mr. Morris at the time and I thought he might be indebted to Morris then. Morris replied, "all right; send Jimmie to me." I sent my son to Mr. Morris. I have understood since that Mr. Morris paid the judgment, but of this I do not know. The transfer that I advised was a transfer that would get the stock entirely in the hands of Mr. Morris, and fully protect him against any other claims against the stock. I had regarded Mr. Morris up to that time as simply holding the stock without any interest in, or claim to it. I said to Mr. Morris at the time that I advised the transfer, with a view of protecting him as well as my son.

Dep. F. M. Gilmer, Record, pp. 180.

TESTIMONY OF F. M. GILMER IN THIS CAUSE.

Q. Do you recollect anything about a levy of an execution upon the remaining part of that stock, in 1875, by the sheriff, as the property of J. N. Gilmer?

A. I do.

Q. Well, state what occurred at that time?

A. Dr. Caldwell, the preident of the Elyton Land Company, met me on the street, and told me that Jimmie's stock had been levied on by the sheriff, and that it was personal property and could not be redeemed, and advised me to report to Jimmie to look after it and take care of it.

After leaving him about two or three minutes, I met Mr. Morris on the sidewalk, and told him of the circumstances, and asked him to advance the amount for Jimmie and hold the stock as collateral for the payment. He said "All right, send Jimmie to me, and I will make the arrangement." I went to his (Gilmer's) office and so reported it, and advised him to go and see Mr. Morris. He did so, and told me that Mr. Morris had agreed to do it, and that Mr. Morris still held this certificate.

Dep. F. M. Gilmer, Record p. 74.

Q. Well, in your negotiations with Mr. Morris in 1875, on the occasion of the levy of that execution upon this stock, was there anything, and if so what, said in reference to the stock being security for any future indebtedness of J. N. Gilmer?

A. He was to hold the stock for that advance and for all future liabilities of the said J. N. Gilmer.

Q. To whom?

A. To Josiah Morris & Co., or the parties advancing, and for all the firms with which he might be connected.

Dep. F. M. Gilmer, Rec. pp. 77,78.

This being the state of the pleadings the cause was submitted to the Chancellor on pleadings and testimony as noted.—See Final decree, Record, p. 289.

In his opinion the Chancellor says:

"Now the question to be determined, is—

1. Whether Josiah Morris has held the legal title and the possession of this stock for more than six years.

2. Whether J. N. Gilmer has asserted, or Mr. Morris has recognized any equity, or lien, upon them during the six years before the filing of this bill." Record p. 287.

And after discussing the law of the case, he says:

I am not able to discover that Mr. Morris has so recognized the rights of Mr. Gilmer as to interrupt the running of the statute of limitations. The mere fact that he now in his testimony explains the transaction without any consent to recognize and act upon Mr. Gilmer's claim, is not such a recognition. In fact, if every day since 1875 he had given such an explanation, the effect would not have been to stop the running of the statute. His holding was always subject to Gilmer's right to redeem, and if he recognized the right to redeem all the time, until the expiration of six years, his possession continued to be adverse. A recognition of his right to redeem afterwards would revive that right if legally made." Record, p. 288.

Why should the Chancellor wade through the testimony to discover whether Morris had "so recognized the rights of Mr. Gilmer as to interrupt the running of the statute of limitations," if the bill was dismissed for want of sufficient allegations?

When was it ever heard before that the testimony was looked into to determine whether pleadings were defective? And has it ever before been seriously asserted in any court, that a dismissal for want of *proof* of acts of recognition to interrupt the running of the statute of limitations, was a dismissal for defects in the pleadings. The opinion of the Chancellor does not show that he held there was no sufficient averment to take the case out of the statute of limitations, but that there was no proof of facts to interrupt its running.

The position now taken by counsel for appellee was not that assumed in the Supreme Court of Alabama, as is shown by the briefs they filed there. The propositions on which the cause was rested by his counsel in that court were

that "the stock was pledged under one of the following conditions:

"First, a pledge for specific debt for an indefinite period.

"Second, a pledge for a specific debt for an *indefinite* period, but afterwards enlarged into one for continuing any future debts for an *indefinit* period."

And the plea of the statute of limitations will be argued on the following hypotheses:

First, of a secret intent on the part of the respondent to hold adversely; second, that he held permissively and under the terms of the agreement until within six years of the commencement of this suit."

Argument of Gunter & Blakey in Supreme Court of Alabama, July, 1885. Record, p. 300.

They insisted that the proof showed a new pledge in 1875, and because the amount of the execution was charged to Gilmer & Donaldson, they insisted that this "amounted in law to a new advance on this stock for complainant's accommodation and a new pledge of the stock therefor."

Same brief, p. 302. See, also, pp. 303, 304 to 323.

In their Reply argument (Record p. 328) they say:

"The appellant filed his bill to redeem a pledge of stock and for an account of dividends."

"*The plea of the statute of limitations* was interposed and the bill was dismissed by the Chancellor on the ground that the right to redeem was barred in six years."

No less than fourteen pages of the present record are taken up with the brief of appellees counsel, in the Supreme Court of Alabama, discussing the statute of limitations in connection with the evidence. Record, pp. 309 to 323, both inclusive.

In the reply argument (Record pp. 329, 330) it is insisted

"That after March 1875, the original agreement was enlarged into one for future and continuing credit on the faith of the stock, and that this continued until 1884."

Again on page 337 they say:

"There is nothing which shows that the advances or agreement for credit were confined to the period from 1871 to 1875; and on the other hand, it appears that the stock became and was a basis of credit as charged in the bill, and that the advances and dealings continued to shortly before the filing of the bill."

Upon the issues thus made, the cause was argued and sub-

mitted to the Supreme Court of Alabama, and both of the judges who heard the cause, have delivered opinions on the merits.

Appellee, through his counsel, then insisted that there was a new pledge in 1875, at the same time, and under the same circumstances, now relied upon as a basis of recovery, argued and reiterated it, and this is what induced the remark of Mr. Justice Somerville in the opinion filed, that "There is neither averment, nor satisfactory proof of any recognition on the defendant Morris' part, of any existing trust relationship between himself and the complainant, intermediate between the time of the original transaction and the filing of the bill." The decision was a response to the position assumed by complainant's counsel in their argument in the Supreme Court of Alabama, which is the identical point or issue now raised in this cause. The issue there was whether the stock was the property of appellant or appellee. Appellant set up laches and the statute of limitations, and appellee undertook to reply by his proof, a recognition within six years, and upon this case the Chancellor, and afterwards the Supreme Court, held that complainant failed in his proof, and for want of proof, was barred of a recovery on the bill and proof in 1884.

Complainant, not content with this decision, through his counsel, filed an application for a rehearing, and insisted that his bill upon a proper construction averred a continuing pledge, and that the testimony showed it.

Argument on application for rehearing, December Term, 1885. *Record, pp.* 344, 345.

They insisted that the defense of staleness was met by the proof already in the case.

Ib. Par. IV, *Record, pp.* 348.

After all this, after securing a full hearing on the merits, and having the Supreme Court to re-examine the testimony offered by him to meet the defense of staleness, and after the Supreme Court held the testimony insuffi-

cient, it is for the first time suggested that the bill was dismissed upon demurrer for insufficient allegations, and the proposition so often repudiated in this Court, and in the Supreme Court of Alabama, is asserted, that the complainant was not required to state the facts which take his case out of the presumption of staleness or limitation, unless the defense is made.

Counsel then urged as ground for a modification of the decree that the absolute dismissal would bar complainant of the right to bring another suit for this same stock. Briefs of counsel. *Record, pp.* 357 to 367.

In response to these applications Chief Justice Stone, for the Court, files an opinion and finds as a fact from the evidense, that there was *no proof of any recognition by Morris within eight years* before the filing of the bill in 1884, on the most liberal interpretation of the evidence. Says the Chief Justice, in answer to the contention that the bill was dismissed on demurrer:

"The ruling of the Chancellor was on the testimony, and governed by it alone, he reached the conclusion that complainant's claim was barred by staleness. We have examined the testimony with great care, and have reached the conclusion that the Chancellor did not err in his rulings on the testimony, nor in the application of the law thereto."

"If the bill had been all the complainant could desire; if it had averred acts of recognition by Morris, so as to relieve the claim of the imputation of staleness, the proof in the present record would not sustain such averments.

The claim under the proof would still be stale, and barred on that account. This is not a case of sufficient proof and insufficient averment. If it were we would grant the motion.

How, we ask, on this state of pleadings and proof, can it be successfully contended that the dismissal was on demurrer? Whether the former bill was dismissed on demurrer or not, was directly presented to the Supreme Court of Alabama, by appellee. His counsel argued that it was, and that Court determined that it was not.

Apart from the express terms of the opinions filed the settled rule of practice in Alabama is, that unless the record dis-

closes that the demurrer was passed upon by the court below it is regarded as waived by the party interposing it.

In *Walker v. Cuthbert*, 10 Ala. 213, it is held that when it is not shown by the judgment entry that a demurrer was disposed of, the inference is that it was waived.

In *Corbitt v. Carroll*, 50 Ala. 316, it is said:

"When the record shows that the demurrer was not formally disposed of by the judgment of the court below, it does not show that any judgment was rendered upon it, and there is nothing to review. In such a case, the demurrer will be regarded as waived."

In *Daughdrill v. Helms*, 53 Ala. 65, the court says:

"The demurrer of defendant in this cause was filed with his answer; and the attention of the court appears not to have been directed to it. No judgment is thereupon rendered. The submission entry recites: "This day came the parties by their Solicitors and this cause is submitted for final decree on the pleadings and proof." Then follows a note of the evidence offered on behalf of each party. As nothing was said about the demurrer and the parties proceeded to a trial, we must consider that the demurrer was waived by the defendant."

See, also, *Youngblood v. Youngblood*, 54 Ala. 486.

The note of testimony in the former suit does not show that the demurrer was submitted. (*Record*, p. 173,) and the decree of the Chancellor shows that the cause was submitted "on the pleadings and testimony, as noted." Record, p. 289.

There is not one word in the opinion or decree of the Chancellor which shows that the demurrer was ever considered or passed upon by him, and we submit, on the contrary, they each show affirmatively that the demurrers were disregarded and the case disposed of on the merits, and it was so disposed of by the Supreme Court on appeal. We are satisfied that the learned counsel for appellee cannot distinguish this case from Daughdrill v. Helms, *supra*.

But if it were true that the former bill was dismissed on the demurrer of the statute of limitations we submit that this was a dismissal on the merits, and it was incumbent on appellee, if he could do so, to amend his bill to meet the defense of the statute of limitations, however this defense was set up.

Mr. Freeman, in his work on Judgments, defines merits:

"It is sufficient that the status of the action was such that the parties might have had their law suit disposed of according to their respective rights, if they had presented all their evidence and the court had properly understood the facts and correctly applied the law. But if either party fails to present all his proofs or improperly manage his case, or afterwards discover additional evidence in his behalf, or if the court find contrary to the evidence or misapply the law, in all these cases the judgment until corrected or vacated in some appropriate manner, is as conclusive upon the parties as though it had settled their controversy in accordance with the principles of abstract justice."

Freeman on Judgments, § 260.

It can make no difference how the defense is made, whether by plea or demurrer, because it goes to the complainant's right to recover, for the numerous cases in this court and the Supreme court of Alabama cited by us have settled the rule that so far as *laches* and staleness are concerned, it is incumbent on the complainant to satisfactorily account for delay in presenting his claim, and on this principle is based the rule that the objection arising from lapse of time apparent on the bill and exhibits may be taken advantage of on demurrer, Lord Thurlow in *Deloraine v. Brown*, 3 Bro. Ch. R. 646, held that the defense could not be made in this form, but this is not the rule of this court or of the supreme court of Alabama.

In *Maxwell v. Kennedy*, 8 How. 222, Chief Justice Taney, after referring to the opinion of Lord Thurlow and holding it was not the rule of this court, says:

"For there must appear to have been reasonable diligence, as well as good faith, to call its (the court of equity) powers into action; and if either are wanting it will remain passive and refuse its aid.

"This is the principle recognized by this court in Piatt v. Vattier, 9 Pet. 416; McKnight v. Taylor, 1 How. 168; Bowman v. Wathem, 1 How. 189. * * *

"Upon this principle the proper rule of pleading would seem to be, that, when the case stated by the bill appears to be one in which a court of equity will refuse its aid, the defendant should be permitted to resist it by demurrer. And as the laches of the complainant in the assertion of his claims is a bar in equity, there can be no good reason for requiringa plea or answer to bring it to the notice of the court."

Sims v. Canfield, 2 Ala. 555, was a bill filed to redeem a slave, and the statute of limitations was relied on. The court said, p. 561:

"It is argued, that the defense of the statute of limitations is not set up by the answer; and, therefore, is not entitled to be considered. It is probable that the pleader intended to present this point distinctly; but in this, we think he has failed, as the statute is neither pleaded nor insisted on in definite terms." * * * "It is equally clear, however, that the lapse of time is stated and relied on as a bar." * * * "*The complainant, in our opinion, must show such a title as will enable him to maintain the suit; and if he has no title, it is unnecessary to examine what defense is made by the defendant.*" (*The italics are ours.*)

And it appearing that the complainant had failed to allege in his bill that his right to redeem had accrued within six years, it was dismissed.

In *Johnson v. Johnson*, 5 Ala. 102, the rule is thus stated:

"When lapse of time is relied on by the defendant, if the complainant wishes to bring his case within any of the exceptions, he must amend his bill or file a special replication, putting such new matter in issue."

In *Nimmo v. Stewart*, 21 Ala. 682, this identical proposition is presented and decided. There the bill was filed by Nimmo v. Thomas Stewart, who answered, but did not plead, nor set up by way of demurrer laches, lapse of time or the statute of limitations, his answer, however, contained a general demurrer. Thomas Stewart died, and the suit was revived against William Stewart, his executor, who set up the statute of limitations in answer to the bill of revivor. On the appeal it was insisted, that as the testator had not relied on the statute against the original bill, his executor could not set it up against the bill of revivor. Chief Justice Dargan, speaking for the court, thus disposes of the case, p. 693:

"But I think it unnecessary to examine this question of practice, for the answer of Thomas Stewart contains a general demurrer to the bill, and that upon its face shows that the remedy is barred; and the benefit can in such case be as well invoked by a demurrer as by a plea."

In *Ragland v. Morton*, 41 Ala. 344, it was contended, as was contended in this case, that the bill showed a continuing trust, and hence was not open to the objection of lapse of time and staleness, which were interposed by way of demurrer, but, says the court, p. 347:

"The bill, when construed by the rules applicable to pleadings in equity, does not show a continuing trust on the part of Ragland, nor

any act or admission of his, within twenty years next preceding the filing of the bill, of such a trust, or any trust, within any exception to the rule, or relieve the case from its operation. If there are any acts, or admissions of Ragland, which would do so, they should have been averred in the bill, or by way of special replication."

And the court, to prevent the bar of an absolute dismissal, and to give the complainant an opportunity to amend, reversed the decree of the chancellor and remanded the cause.

In *Parker v. Jones*, 67 Ala., on page 236, the court, after deciding that the defense of the statute of limitations can only be raised by demurrer or plea, declare the rule to be, when it is so raised:

"If, in such event, there is any reason for excepting the given case from the operation of the statute, it must be introduced by an amendment to the bill, or raised by way of special replication to a plea."

And this is the rule in this court.

In *Piatt v. Vattier*, 9 Peters, on page 416, this court declares the rule to be:

"And the doctrine is now clearly established that if the statute of limitations is relied on as a bar, the plaintiff, if he would avoid it by any exception in the statute, must expressly allege it in his bill, or specially reply to it; or, what is the modern practice, amend his bill, if it contains no suitable allegation to meet the bar."

The duty to amend his bill must refer to cases in which the statute of limitations is presented by demurrer filed by defendant, as in the former case between these parties, that is, it is his duty—the plantiff's—to amend his bill by showing a recognition of the right of the plaintiff by the defendant within the time which will prevent the bar of the statute.

Beaubien v. Beaubien, 23 How. 190, 208, is to the same effect.

See, also, National Bank v. Carpenter, 101 U. S. 567; Bissell v. Spring Valley Township, 124 U. S. 225.

Confident as we are of the positions we have assumed, we respectfully submit that the identity of the causes of action in the former and this suit, has been passed upon by the chancery court of Alabama, and decided against appellee's

present contention. The original bill filed in the State court, appellee alleged a pledge on March 30, 1875, (Paragraph 3 of original bill, Record, p. 162), and after the answers of defendants were filed, appellee amended his bill and alleged the pledge of 1871. (Par. 2 amended bill, Record, p. 166.) Under the statutes of Alabama amendments are allowed as matter of right in equity causes to complainant at any time before final decree, and the only limit upon this right is that the complainant must not state a new case or make an entire change of parties.

Johnston v. Mastin, 54 Ala. 271.
Pitts v. Powledge, 56 Ala. 147.
Scott v. Ware, 64 Ala. 171.
Rapier v. Gulf City Paper Co. 69 Ala. 481.
Code of 1886. Sec. 3249.

Under the rules of practice in the chancery courts of Alabama, the defendant made a motion to strike the amended bill from the file on the ground that it presented a new case. (Motion to strike amended bill from Docket, Record, p. 173.) This motion necessarily involved a determination of the question whether the alleged pledge of 1875 was a different cause of action from the rights arising under the agreement of 1871, for if it was, then under the Alabama decisions the amendment was not allowable, but if it were the same cause of action the amended bill would lie. Appellee then insisted, that they both constituted one cause of action, and on consideration the chancellor so held, and overruled the motion; (Decretal order, Record, p. 287,) and appellee had the benefit of that ruling and presented his case in what he then regarded its strongest aspect. He lost nothing, because if his cause of action under each bill was the same, then he could under either present all of his facts, and the pledge of 1875 now so confidently relied upon by appellee as a new cause of action, was by appellee's own action put within the issues of the former suit by force of this decree. It required no additional allegation to put it in issue, for the chancellor, by the decretal order, determined that on the bill as it stood; it was the same cause of action

as the pledge of 1875. How else could the amended bill have been sustained and appellee secure the privilege of trying his right under the agreement of 1871? That appellee then considered the pledge of 1875 as pertinent and relevant to the issues then made, there can be no question, for the identical evidence brought out by him in that case he now relies upon to establish this. In the first case the alleged pledge of 1875 is proved by appellee and his father. (Dep. J. N. Gilmer, Ans. to 7th Interrog., Record, p. 182.) (Dep. F. M. Gilmer, Ans. to 7th Interrog., Record, p. 180.) The decretal order made the evidence competent, and had it shown a recognition which would avoid the defense of staleness, laches and the statute of limitations, complainant would have been entitled to a modification of the decree of dismissal. But complainant did not make "a case of sufficient proof and insufficient averment," for the Supreme Court of Alabama, on the identical evidence, on which the circuit court in this case found acts of recognition, determined that there was no sufficient evidence of recognition.

Opinion of Stone, C. J., Record, pp. 295, 296, 297.

Opinion of Bruce, J., Record, pp. 374, 375.

On the application for a rehearing this pledge of 1875 was again urged upon the court as ground for modifying the decree, and the proof again held insufficient to show a recognition. Exhibit 3, Record, pp. 343, 344.

In the language used in Case v. Beauregard, 101 U. S., the Supreme Court of Alabama regarded the case and treated it, as requiring an adjudication of complainant's equity," or as said in Corcoran v. Canal Company, quoted and italicized in Louis v. Brown Township, 109 U. S. 167:

"If the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree, so far as it affects rights presented to the court and passed upon by its decree."

That this identical matter was passed upon and determined in favor of complainant, the motion and the decretal order thereon, we submit, does not leave open to question. Having secured the benefit of this ruling, is not appellee

estopped to change front and now deny the fact upon which he insisted to secure this ruling? The ruling on this motion, if adverse, was fatal to complainant's case, and in order to secure the decretal order, he then insisted that the two transactions constituted but one *cause* of *action*, and induced the court so to hold. Having obtained this ruling, and all the benefits flowing from it, he undertakes to repudiate it, and now insists that the *two transactions are independent, separate causes of action.*

"A party," says Mr. Herman, "who obtains or defeats a judgment, by pleading or representing a thing or judgment in one aspect, is estopped from giving it another in a suit founded upon the same subject-matter."

Herman on Estoppel, § 165.

The above is quoted by the Supreme Court of Alabama in *Hill v. Huckabee*, 70 Ala. 188, where all the authorities are collected, including the leading case of Phila. W. & B. Railroad Co. v. Howard, 13 How. 307.

In *Caldwell v. Smith*, 77 Ala. 165, thedefendant in a suit brought by one Alexander, set up that he was the tenant of Smith, and in a suit afterwards brought by Smith he undertook to set up that he was the tenant of Alexander. The court says:

"He defended, and may have defeated Alexander's suit by asserting that he was Smith's tenant; now he can not defeat Smith's suit, by asserting that he was Alexander's tenant—the evidence showing that he was either the one or the other."

The principle of the estoppel is thus stated:

"Where a fact has been asserted, or an admission made through which an advantage has been derived from another, or upon the faith of which another has been induced to act to his prejudice, so that the denial would be a breach of good faith, the law precludes the party from repudiating such representation or afterwards denying the truth of such admission."

1 Greenl. Ev. (14th Ed.), §§ 27, 207.

In *Wallace v. Loomis*, 97 U. S. 154, 155, the appellant, as the holder of certain bonds of a railroad company, was party to a suit in equity and filed a cross bill attacking the corporate existence of the corporation and the validity of the bonds. The court said in view of the facts proved:

"We think that the appellant is estopped from denying the corporate existence of the company whose bonds he thus holds, and by virtue of which he acquires a *locus standi* in the suit."

Appellee, in the former suit, obtained the advantage and secured the right to have his whole cause submitted and heard, and his *locus standi* in the State courts depended on the determination of the motion in his favor. As was said by this court in *Bissell v. Spring Valley Township*, 124 U. S. 232:

"Courts are not established to adjudge what the law might be upon possible facts, but to adjudge the rights of parties upon existing facts; and when their jurisdiction is invoked parties will be presumed to represent in their pleadings the actual, and not supposable, facts touching the matters in controversy."

In *Hill v. National Bank*, 97 U. S. 450, Hill being indebted on certain notes, executed and delivered to one Shoemaker a deed of trust, in fee simple, on certain lots on which there had been erected a paper mill, which was operated by water power. The notes secured by the deed were transferred to the bank, and default being made in their payment, the lots were sold by the trustee, under the power contained in the deed of trust, without reference to the fixed machinery and water power connected therewith. Hill filed a bill to set aside this sale, upon the ground that the realty, the water power and machinery constituted an entirety and should have been sold together, and obtained a decree vacating the sale. The bank then filed a bill to foreclose the deed of trust, and obtained a decree for the sale of the property, as an entirety, and from this decree Hill appealed and assigned as error, that the court decreed the sale of the machinery not permanently attached, without evidence as to the manner and intention of its annexation, and decreed the sale of the water power as appurtenant to the land.

"The questions raised by the assignments are concluded by the former decree," says this court, p. 452, "and both parties are barred from litigating them a second time. Story Eq. Jur. Sec. 1523. *The law of estoppel is founded in reason and justice. It makes the acts and conduct of a party binding against him whenever it should be so, and will not permit him to assert any claim to the contrary. He thus makes the law of his case, and he must abide the consequences.* When in the former case the sale

by the trustee was challenged by the appellant, he and the appellee were both before the court with their proofs, and the case was fully heard. We have shown the result, and we do not sit here to review or reverse it. The decree upon the points in issue, and decided, is as binding upon the parties as a judgment or decree would be in any case." (The italics are ours.)

In the suit in the State court appellee made "the law of his case," that the two transactions constituted but one cause of action, and he must now "abide the consequences of his own conduct."

The case last cited is in strict analogy with the one at bar, and the principle there declared is all we contend for. In the State court the express question now to be determined was presented and the parties heard and a decree rendered, by which appellee secured the advantage of having the whole of his rights under both transactions passed upon, and yet he now insists that he was then mistaken, and asks this court to review or reverse the decree he then procured to be made. Unless this court is prepared to recede from the position taken in this last case we do not see how appellee can avoid the effect of the former decision.

So in *Daniels v. Tearney*, 102 U. S. 415, where a party gave bond under an unconstitutional stay law and obtained the benefit of a stay, it was held that the maker, even conceding the bond to have been wholly void, having had the benefit of the bond, was estopped to deny its validity.

Bucher v. Cheshire Railroad Co., 125 U. S. 555, 577, is instructive on this point. There the plaintiff brought suit in the courts of Massachusetts against the railroad company to recover damages for personal injuries received while travelling in its cars. The defense was made that the plaintiff was travelling, and was injured on Sunday, and by the statutes of Massachusetts, it was unlawful to travel on Sunday, except upon a work of charity or necessity. The plaintiff had a verdict and judgment in the lower court, but on appeal, the Supreme Court reversed the judgment and remanded the cause, and thereupon the plaintiff took a nonsuit, and began a suit in the Circuit Court of the United

States. On the trial, the plaintiff offered the same evidence to bring himself within the exceptions, as was offered in the State court, but the Circuit Court rejected it, and this was one of the errors assigned. This court sustained this ruling, not on the principle of estoppel, or *res adjudicata*, but upon the ground that the Supreme Court of the State, in its decision, had given such a construction to the words "charity" and "necessity" in the statute, as to clearly show that the evidence offered upon that subject was not sufficient to prove that the plaintiff was travelling for either of those purposes.

The opinions delivered by the Supreme Court of Alabama leave no doubt about the fact that in the conclusions they reached, they were governed by the merits solely, and examined with "painstaking care" the evidence which the court, in this case holds, was irrelevant, and gave the plaintiff the full benefit of the pledge now relied on as a new cause of action, and held that the proof was insufficient to show acts of recognition.

The principle we contend for is very clearly stated by Chancellor Walworth in Miller v. Manice, 6 Hill, 114, 121:

"When a general declaration embraces several causes of action, the plaintiff, in a second suit, may show that he offered no evidence as to one or more of those causes of action, and that the cause went to the jury upon a different part of his claims from that for which the second suit is brought. And then the judgment in the first action will be no bar to the second. But where he attempts to give evidence as to all the causes of action, and submits the question to the jury without withdrawing any part of his claim, and he fails as to the whole or a part for want of sufficient proof, the defendant may insist upon the first judgment as a bar, if the same evidence which is sufficient to sustain the second suit would have authorized a recovery in the first action in case it had been produced upon the trial thereof."

Unquestionably the ruling of the Chancellor on the motion to strike the amended bill determined that both transactions were before the court, and the identical proof now offered was then presented to sustain that suit, and the Chancellor and the Supreme Court of Alabama considered it and held it to be insufficient to prove that it was offered to establish

a continuing pledge or acts of recognition within six years.

THE EFFECT OF THE JUDGMENT.

We now propose to discuss the effect of the judgment of the State court, as shown by the record of that cause and other evidence introduced on the trial below on the right of appellee to maintain this suit. It is shown that the original bill filed by him in the State court, alleged that the stock in 1875 was transferred to appellant as a security for a debt due by the firm of Gilmer & Donaldson.

Original bill, par. 2, 3. Record, pp. 13, 14.

It must be presumed that the original bill was prepared under the direction of appellee and his father, his chief witness in this case. If this presumption be correct, and we respectfully insist it must be, it is evident that both of them had esteemed appellee's interest in the stock of so little value that they had entirely ceased to think of it, for it is evident that they had no idea of the true agreement as shown by the subsequent pleadings and evidence. The bill was framed to redeem from the pledge to secure the debt of Gilmer & Donaldson. This bill was filed July 7, 1884. To this bill an answer was filed August 16, 1884. That answer showed that the certificate of stock was transferred December 30, 1871, instead of March 30th, 1875, before the firm of Gilmer & Donaldson was formed.

Record, pp. 16, 17.

Appellee then amended his bill by alleging facts which seem, until reminded of them by defendant's answer, to have entirely escaped his memory. In that amendment he sets up that the privilege of taking the stock upon the organization of the company was originally given to his father, but that he declined to take it, and asked and obtained the privilege for him, appellee. The amended bill then sets out the original issue, the transfer of the sixty shares to Linn for six thousand dollars and the retention by appellant of the other sixty shares substantially as it is alleged in the present bill, as a security for the balance due upon the original purchase-money. One thing

shown by the allegations of this amended bill is most remarkable; although appellee during all this time, was hard up for money, although he knew that one-half of what he claims was his stock had sold for enough to pay the cost of the whole, leaving the other half as a security for only a few months' interest on that sum, yet even up to the time of the filing of this bill in the State court he had never, according to his own statements, ascertained what that amount was. A man tightly pressed, owning stock worth six thousand dollars as he believed and which constituted all the property he owned, [Dep. J. N. Gilmer, Record, p. 99.] owing but a few dollars thereon and yet never making any inquiry as to what that indebtedness was. Such a state of facts is utterly irreconcilable with the idea, that he, a man of certainly ordinary business capacity, supposed that he was the owner of the stock. But the bill as amended goes on to allege that the stock was suffered to remain with appellant as a basis of credit for money that his firm might advance to plaintiff, as well as for what was due to appellant individually. It also alleges that he did become indebted to said firm in various sums of money. Again, in the 5th paragraph of said amended bill he concedes that the stock was a security for whatever he owed appellant or firm of Morris & Co., for money advanced to him or for his account, which would certainly include the firms of which he, appellee, was a member. In the prayer of said original bill he offers to pay all of these advances.

Record, pp. 18, 19.

In the answer to this bill as amended, appellant denied that appellee had ever owned the stock, and also both by demurrer and answer set up the statute of limitations. Let us note, the defenses set up by the answer were: 1st. A denial of ownership originally in appellee. 2d. That if he had ever owned the stock, by the statute of limitations the title had been divested out of him and vested in appellant.

Both defenses presented fairly and squarely the one issue, namely, the ownership of the stock.

Record, pp. 20, 21, 22.

In this cause appellant again presents the same issues as to the ownership of the stock and the additional issue that the question of that ownership had been passed upon and determined in favor of appellant in a former suit between the same parties. When we come to examine the evidence upon which the cause in the State court was submitted, and to compare it with the evidence taken in this cause to support appellee's bill, we find that there is no substantial variance between that then introduced and that now offered. As we have seen, appellee expressly swears that he never even mentioned the subject of the stock to appellant, had no conversation with him relative to it between March, 1875, and the summer of 1884. F. M. Gilmer in his testimony on this trial admits that he has no recollection of any conversation with appellant in which he acknowledged holding the stock as security since 1875. Appellee in his testimony in the State court, in testifying as to the transfer of the stock on the books of the company in 1875, said: "I requested Mr. Morris to pay the judgment and to have the stock transferred on the books of the company to him and to hold the same as security for that amount and any other amount I might be due him. This was done."

Record, p. 182.

In testifying to the same transaction on this trial he details what occurred between them as follows: "Mr. Morris said he would pay it"—the judgment—"and would hold said judgment, and have the stock transferred upon the books of the company as a collateral security for its payment and any other indebtedness I might owe him."

Record, p. 91.

We think the learned counsel representing appellee, will find it a difficult and even an impossible task to convince

any logical mind that the transaction of 1875, as presented to the State court, was in any sense a different transaction from that presented to this court. The State court then clearly had before it the same facts that are before this court. It is the height of absurdity to say that such facts were not relevant to the issues which were before the State court. The bill in that court even as amended, had distinctly alleged that the stock was a pledge, not only for the unpaid purchase-money, but also for other debts due by appellee to appellant and to his firm for advances made to him, appellee or made on his account, and offered to pay them. Evidence of such other advances was then clearly relevant, as under the allegations of the bill appellee could not redeem without paying them. The prayer of that bill was to redeem not only from the debt of 1871, but from other debts created thereafter and due to appellant and to the firm of Morris & Co, In that case the bill as amended did not aver the dates of the creation of those other debts, but the evidence showed them; in this case the bill avers such dates and the same evidence is introduced to sustain the allegations.

That bill was submitted for final decree upon the pleadings and proof, the issue, as we have said, made by the pleading presented fairly and squarely appellee's title to the stock, that title being put in issue by a denial, first, that he had ever owned it, and by an assertion in the second place, that if he ever had so owned it his title had been divested by the statute of limitations, that issue being presented both by a demurrer and by proper allegations made in the answer. On this submission the Chancellor decreed that appellee was entitled to no relief and dismissed his bill absolutely. When we look at that decree we see that it was rendered upon both the pleadings and proof, and upon these it simply declares that appellee was not entitled to any relief, and that his bill should be dismissed. That decree found the issues against appellee, found

that he had no title to the stock, without limitation or qualification. Now, we respectfully insist that it would be a limitation upon the effect of former judgments, which would make the plea of *res adjudicata* an empty and a useless thing, to hold, that another forum, in another suit, possessing no supervisory powers over the court rendering the former judgment, can again inquire into the same title passed upon and determined in that former proceeding.

That title was the issue, plaintiff set up that he was the owner of the stock, appellant denied it and set up title in himself. That was his only defense.

The statute of limitation, where the title to personal or real property is involved, does not operate on the remedy but affects the title. In suits for the recovery of real estate where defendant shows adverse possession for ten years the law conclusively presumes a grant from the true owner, and vests him with the title as fully as if he shows a deed in proper form conveying that title. The same presumption arises from the adverse holding of personal property for six years. The Supreme Court of this State, and the Chancellor on the former trial, decided that on the 31st day of March, 1881, the expiration of six years from the transfer of the stock on the books of the company, whatever title appellee had ever had in it, passed out of him, and the absolute title was vested in appellant. It cannot be denied that such is the effect of the decree. See

Code of Alabama 1886 § 2612, note and authorities cited.
Leffingwell v. Warren, 2 Black, 599. 605.
Newcombe v. Leavitt, 22 Ala. 631, 638–9.
Cincinnati v. White, 6 Peters, 431.
Burks v. Mitchell, 78 Ala. 61.

Suppose, instead of setting up a title acquired by six years adverse possession as a defense to the suit in the State court appellant had set up a title acquired by a direct transfer in writing, absolute on its face, and he had won the case on this title, would it be for a moment contended that appellee could maintain another suit wherein the only dif-

ference in the allegations would be a state of facts existing at the time the former suit was instituted, and at the time it was determined, which changed that absolute title into a conditional one? To illustrate, suppose that after a trial and a successful defense on the ground stated, appellee should file another bill setting up that, although the transfer was absolute on its face, there was a private agreement between the parties that it should be only a mortgage for the security of a debt, and that before the commencement of the former suit such debt had been fully paid and discharged; would it be claimed that upon that state of facts a new suit could be maintained involving the title to the same property? We say, both upon reason and authority, such a contention would be absurd. A former judgment between the same parties, for the same subject-matter, when pleaded and shown is a bar. A former judgment, or even a former verdict, without being pleaded, may be shown under the general issue as an estoppel against a subsequent assertion of a right.

Bigelow on Estoppel, p. 84.
Cromwell v. County of Sac, 94 U. S. 351, 352.

Appellee took issue with appellant on his defense that set up title in him, at the commencement of the former suit. That issue was decided in favor of appellant and appellee can never again have tried that question, namely, that at the commencement of the suit in the State court the title to the property in controversy was not in appellee but was in appellant. Appellee is estopped, conclusively by the finding in that case.

In 1 Herman on Estoppel, &c., on page 92-3, commencing at the bottom of the former page, the learned author, after stating the general rule, that it is not sufficient that the second action be for the same thing, but that it must also be for the same cause, to make the first an estoppel, says:

"It is otherwise in regard to the right of property; although there may be several different claims for the same thing there can be only one right of property in it; therefore when a cause of action has resulted in favor of the

defendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided, for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; *it is sufficient that they might have been litigated.*"

In *Roberts* v. *Heim*, 27 Ala. 678, plaintiff brought trespass to recover damages of defendant for levying on goods belonging to him under an attachment against a third person. He had interposed a claim in the attachment suit and had recovered. The judgment in that suit was held to be conclusive on the question of title and that defendant could not introduce evidence to contradict that inference, which was drawn from the fact that the title had been in issue in the former suit, and it mattered not whether that particular evidence had or had not been introduced.

Here appellee relies upon the same original title he relied upon in the suit in the State court, appellant in answer set up the same title they set up in the State court.

Clapp v. Bromaghan, 9 Cowen, 530, was an action of ejectment. The plaintiff in the action had prior to that suit been a party to a partition proceeding in which the defendants had also been parties. In that proceeding the title to the property had been put in issue and had been decided adversely to the plaintiff, and the judgment in the partition proceeding was set up as a bar to plaintiff's ejectment for the same property. The Court, on page 569, in passing upon that question says: "A judgment of partition establishes the title to the land which is the subject of partition, and in an action of ejectment *upon an adverse possession* or adverse title, *existing at the date of the partition*, it is final and conclusive at law upon all parties to record."

Warwick v. *Underwood*, 3 Head, 238, was an action of trespass. The main contest was upon the title. There had been a former law-suit between the same parties in which the question of title to the same property had been put in issue. In that case it was urged that on the first suit the

defendant was not bound to show the strength of his title. The Court, in answer to this proposition, said:

"If that were so, all the evils intended to be avoided would continue to exist in an aggravated form. This would be trifling with justice, and cannot be tolerated. Every question raised by the issues in a case, or in some cases, all of which might have been litigated, are considered as closed by the verdict, and that forever as to the same parties. The maxim that there must be an end to litigation was dictated by wisdom and sanctified by age."

Perhaps there was never a case that more forcibly presented the wisdom of that maxim than the case at bar. In the first suit appellee alleged that he was the owner of the property; that he acquired it by original subscription to the capital stock of the Elyton Land Company. His right to redeem is based upon this ownership. Appellant replied to this by denying in the first place that appellee ever owned the stock in question, and in the second place by setting up in himself a subsequently acquired title. Let it be treated as set up by demurrer or by plea, it can make no difference. When appellee took issue on that demurrer, he admitted that if, under the facts alleged in his bill, appellant had been holding the property a sufficient length of time to vest the property in him, then he, appellant, had that title. In either event, the thing directly put in issue was the title to the stock in controversy. We cannot conceive how it is material whether that issue is presented as a question of law or a question of fact; whether it is presented upon an agreed state of facts, or upon a controverted state of facts.

Dixon v. Zadek, 59 Tex. 529.

Francis v. Wood, 81 Ky. 16.

Bissell v. Spring Valley Township, 124 U. S. 225.

No one would contend for a moment that if the action had been detinue by appellee, and the parties had gotten together and agreed to the state of facts as shown by appellee's bill, and thereupon the Court had decided that the title to the stock had vested in appellant, that any other Court could ever have passed upon that question again, except upon some title which had no existence at the time

that suit was determined. What difference, in reason or in legal effect, can it make whether that questien is presented upon a state of facts agreed to, or upon a state of facts set out by plaintiff, and upon which defendant takes issue in law?

If the decree of dismissal had been general, unaccompanied by any opinion of the Chancellor, no one would be so wild as to deny that it was a complete bar, because for all the record would then show, it might have been based upon the establishment of the first defense, namely, that appellee had never had a title, and as he relies upon the same original title in this suit that was relied upon in the former, the judgment against him in that case would certainly have been conclusive.

The position here contended for by us is fully sustained by Mr. Bigelow in his work on Estoppel, and the extensive notes to the text. The difficulty on this point of the case, is in not recognizing the fact of the title to the stock having been the question put in issue in the former suit. The judgment there in favor of the defendant is conclusive of that question, as to any title which the plaintiff has not acquired since the commencement of that suit.

Bigelow on Estoppel, 39 et seq.

In *Coffin v. Knott*, 2 G. Green (Iowa), 582. (52 Am. Dec. 537) which was replevin for stock, defendant plead that in a former action of trespass for taking the same he had plead a release, that to that plea, plaintiff had demurred and the demurrer overruled, and that thereupon judgment had been rendered on that plea for defendant. The Supreme Court of Iowa, in a well considered and able opinion, held the judgment a bar to any other suit for the same property.

Again, conceding that the property was pledged to secure the balance of the purchase money due in 1871, and again pledged in 1875 to secure the judgment and such future debts as appellee might contract with appellant or Morris & Co., and that the former suit was simply to redeem from the

pledge of 1871, we insist that even if that were true, and any question of title was involved, that suit would be a complete and perfect bar to this one.

If appellee had the right to redeem, that right was an indivisible one. If the property he sought to redeem was given as a security for several distinct debts, he must redeem from all of them at once. He had no right to split up his causes of action and to file a bill to redeem from one debt in the State Court, and then, failing in that, to file another bill to redeem from another debt in that Court or any other, where both debts existed when the first bill was filed.

2 Jones on Mortgages, §§ 1072-1079-80.

1 Herman on Estoppel, §§ 218-19-222-23.

Baird v. United States, 96 U. S. 430.

Goodenow v. Litchfield, 49 Ia. 226.

Oliver v. Holt, 11 Ala. 574.

Lee v. Tannenbaum, 62 Ala. 501.

Grigg v. Banks, 59 Ala. 311-317.

Lehman, Durr & Co., v. Collins, 69 Ala. 127.

This rule against splitting up a cause of action is carried so far that where a person undertakes to set up by way of recoupment a part of a demand he is forever precluded from bringing another action for the remainder.

In *Guerney v. Carver*, 8 Wend. 492, a party had brought suit on a part of a running account and had been defeated on plea of tender. The judgment was held to be conclusive against the right to recover another item of the same account, which was not presented in the first suit. See, also,

McLane v. Miller, 12 Ala. 643.

S. & N. Ala. R. R. v. Henlein, 56 Ib. 368.

Simes v. Zane, 24 Pa. St. 242.

It is said, however, in answer to this proposition, that the present bill shows that the pledge of 1871 had ceased to exist before the former suit was commenced, and was merged into that of 1875. We respectfully submit that even if that

were so, it would be no answer to our defense. Appellee would still be esstopped by the judgment in that cause. He filed the bill in the State Court, alleging that the contract of 1871 was a legal subsisting contract. If it had been merged into the contract of 1875, appellant might have availed himself of that as a defense to that suit, but appellant did not see fit to do so. He treated it as a contract which had not been changed by any novation. Both parties by agreement went to trial upon it as a contract which had not been merged into any other. It would be strange indeed if appellee, after testing his rights under that contract and being defeated, could now come into court and say that it was not a contract. Such a proposition would be clearly repugnant to all principles of justice and right, and to the well established principles of estoppel we have heretofore argued, *supra.*

As is said in Railway Co. v. Ramsey, 22 Wall. 327. "They have asked the court to act upon this admission and proceed with the cause. The court did proceed." And it was held that the admission concluded the parties even on a question of jurisdiction.

In *Moody v. Leverich,* 14 Abb. (N. S.). 153, it is said that a party is not allowed in one action to treat a contract as rescinded and in another, sue for a breach thereof. Thus, he cannot bring a *quantum meruit* for services actually rendered, and then bring an action for damages for breach of the special contract under which the services were originally performed.

Mr. Bigelow declares the rule to be, that

"A point once adjudicated by a court of competent jurisdiction, however erroneous the adjudication, may be relied upon as estopped in any subsequent collateral suit in the same or any other court, at law, in chancery, or in admiralty, when either party, or privy of either party, allege anything inconsistent with it; and this too, whether the subsequent suit is upon the same or a different cause of action." Bigelow on Estoppel, 45.

This doctrine of a person being estopped to allege a state of facts inconsistent with those alleged in a former action about the same subject-matter, though a different cause of

action, is well established in the law, and is founded on justice and reason. It certainly would be strange indeed if parties were allowed, as is attempted in this case, after alleging the existence and continuance of a certain contract, and being defeated therein, they should be permitted to recover upon an allegation that that which they had alleged in their former proceeding was untrue. Appellee alleged in the State court that the contract of 1871 was a valid subsisting agreement. Having failed to recover, he now undertakes to recover upon an allegation which denies that the contract of 1871 was a subsisting obligation at the time he filed his former bill. This, we say, it is well settled he cannot do, either upon reason or authority.

Beam v. Macomber, 35 Mich. 455.

Havley v. Forley, 18 B. Mon. 519.

Comparet v. Hanna, 34 Ind. 74.

Hamea v. Scott, 84 Ind. 71, was a proceeding for partition. Plaintiff alleged that he owned one-third, and that the defendant and his wife owned the other two-thirds, jointly in severalty; the defendant relied on a former judgment in partition between him and plaintiff, where it had been determined that plaintiff owned one-third and defendant two-thirds. Plaintiff insisted, that as the wife was not before the court in the former suit and the estate of husband and wife was joint and indivisible, no judgment could be rendered in the first suit binding on the rights of either.

"The fallacy of this argument," says, the court p. 72, "is manifest. As against the judgment decreeing the husband to be the owner of two-thirds and appellant the owner of one-third in fee of the land, the latter has no right to aver that there was title in some one else. In averring this, he affirms that to be true which the judgment declares to be untrue."

We have had occasion above to refer to the testimony of appellee as to the transaction of 1875, and that testimony bears directly upon this point, for if there was any novation by which the contract of 1871 was merged in it, it must be established by that testimony alone. We will repeat it.

In his deposition he says :

"The agreement made was, "Mr. Morris said to me, that he would pay it "and would hold said judgment, and have the stock transferred upon the "books of the company as a collateral security for its payment, and any "other indebtedness I might owe him." Record p. 91.

In this there is not a word said as to the debt of 1871. It was not necessary that it should be said. Appellant had at any time after December, 1871, the right to transfer that stock upon the books of the company as collateral security for the debt due upon the purchase-money. That debt existed, and its form and character were certainly not changed by the agreement of 1875. Appellee does not pretend that he made any new promise to pay it. Suppose the stock had become worthless, and seven years after December, 1871, appellant had brought suit against appellee for the recovery of that debt. Could he have recovered it? We think, clearly not. There was no new promise on the part of appellee to pay the debt, and while there might have been an acknowledgment of the existence of a debt, it cannot possibly be construed into a novation, and even as an acknowledgment of its existence it was not sufficient to take the debt out of the statute of limitations.

We cannot conceive then, how the transaction of 1875, as detailed by appellee himself, can be construed as a novation of the contract of 1871, when that contract was not even sufficient, as we have seen, to stop the running of the statute of limitations against the debt.

Code of 1886, § 2628.

Mr. Chitty, quoting from Pothier, defines a novation as a "Substitution of a new debt for an old. The old debt is extinguished by "the new one contracted in its stead, for which reason a "novation is in-"cluded amongst the different means by which obligations are extinguished." In a note to that page, he says of novations, that "by the civil law,"—and it is the creature of the civil law,—"it arose when a new contract was entered into with intent to dissolve the former engagement."

It is agreed by all law writers that in order to constitute such a novation there must be a distinct agreement and understanding between the parties that the old contract shall be extinguished and the new one take its place. The authori-

ties on this point are abundant and will be found cited in the notes to 2 Chitty on Contracts, pp. 1371–4.

In Alabama the same doctrine prevails. In *Keel v. Larkin*, 72 Ala. 493, it is declared that the question of whether a new security executed by a debtor is taken in payment and discharge of a pre-existing debt for which it is given, is a question of intention, and that in order to make it other than a collateral or additional security the proof must show that by express agreement, or agreement necessarily implied, it was intended to be an extinguishment or satisfaction for the former claim.

In *Marlow v. Benagh*, 52 Ala. 112, the Supreme Court of this State declared the rule to be that a second mortgage, in the absence of a release, or of some covenant or agreement that it should operate as a satisfaction of the first, is deemed merely an additional security for the debt, and cites in support of that proposition two cases which will be noticed here.

McGuire v. Van Pelt, 55 Ala. 344, is to the same effect.

Gregory v. Thomas, 20 Wend. 17, was an action of trover brought by Thomas under a mortgage made to him by one Wymer on the 12th of September, 1834. The defendant, Gregory, claimed under a mortgage executed on the 19th day of June, 1834. In March, 1835, after the execution of the mortgage to plaintiff, the defendant by his agent had demanded of Wymer the possession of the property, but upon Wymer pleading for an extension, and promising to give a new mortgage, time was granted him. Thereupon he did give a new mortgage on the 13th day of May, 1835, on the same and other property, and it was insisted by plaintiff that thereby the mortgage of June, 1834, was released and discharged.

The Court by Judge Cowen declared:

"The position is against all books, ancient and modern," saying, "adjudications of several centuries upon such cases of every variety of form, in England, in this State, and in neighboring States, settled the proposition that a subsequent security of a debt of equal degree with the former, for the same debt, will not by operation of law extinguish it." Again, "A judgment re-

covered on another judgment is not a satisfaction of the latter till the money is paid."

It is true that in *Billingslea v. Harrell*, 11 Ala. it was said by our court that a second mortgage on the same and other property, extending the law day to a period beyond the time stipulated in the first, would bind the creditor not to proceed on the first. That case, however, would not be applicable here. The reason for it does not exist here. If appellant by the second mortgage bound himself not to proceed, then there might be some reason for contending that the first mortgage was extinguished, but in the case at bar there was no such agreement. Appellant did not agree, even by the evidence of appellee, to wait one day or even one hour. He could have foreclosed his pledge at any time on or after the 30th of March, 1875, as well as prior to that time. But the position assumed by the court in Billingslea v. Harrell, is distinctly repudiatedby this court in a later case. In *Boyd v. Beck*, 27th Ala., p. 703, the court expressly approves *Gregory v. Thomas*, *supra* and declares, "we assent to the reason on which the above case rests, and hold that the lien of the first mortgage was not destroyed by the execution of the second. It operated only a postponement of the law day." (See p. 712.)

We cannot see then, how it is possible upon this state of facts, to hold that there was ever an extinguishment of the pledge of 1871. If there was not, it does seem that it requires no argument to show that if a debtor files a bill to redeem a piece of property, from one mortgage and is defeated thereon, that he cannot afterwards file a bill to redeem the same property from a second mortgage, existing at the time the first bill was filed. The court, if it granted him relief, would be necessarily compelled to declare either that he should redeem from the second mortgage alone and the debts secured thereby, and thus prevent the creditors from recovering the debts secured by the first mortgage, and leave the title in the creditor created by that mortgage, or else it would have to divest out of such creditor the title created by that first mortgage; and if it did that, it would necessarily ad-

judicate the very question that had been passed upon in the former suit.

Take the case at bar. Appellee asks to redeem the stock in question. Appellant holds that stock under the pledge of 1871, and under the pledge of 1875. As long as the pledge of 1871 is treated and regarded as a valid pledge, this court has no right to take from him the possession of the property covered by it. This court cannot possibly permit appellee to redeem this property without divesting appellant of whatever right or title he acquired by the pledge of 1871, and it cannot possibly divest him of that right and title unless it again adjudicates the rights of the parties under that pledge, and adjudicates them contrary to the judgment and decree of the State court. It does seem to us that this position is entirely conclusive of the case at bar. Certainly unless the contract of 1871 has been extinguished, appellant has rights under it. That it has not been extinguished unless it is merged as it is in the decree of the State court, we do not think admits of a doubt. If it still subsists, or if it is merged in the decree of the State court, this court cannot deprive appellant of the rights acquired thereunder, without again passing upon every question determined in the State court, and without depriving him of the benefits and rights accruing to him under the decree in that cause. Yet this is what, the decree in the court below does, for on the redemption the balance of the debt of 1871 is included.

Schedule A, Report of Special Master. Record, p. 383

While it may be true, as said by Knight Bruce, V. C., in *Barrs v. Jackson*, 1 Yo. and Coll. 597-8, that by a former judgment facts necessary to sustain it,

"are not all necessarily established conclusively between the parties, and that either may again litigate them *for any other purpose* as to which they may come in question,"

yet, it is equally true, as declared by the same learned judge, that such limitation, upon the effect of such former judgment, is, itself, subject to a limitation, and that is,

"provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object."

The subject of the decision of the State court was the right of appellee to pay the balance he owed on the purchase-money of the stock here involved, and other amounts he had thereafter obtained on the faith of it, and take the stock; the court decided expressly that he had no such right and this court cannot now decide in his favor unless it decides that he has a right to pay the balance of such purchase-money, for appellee cannot under any circumstances take this stock without paying the debt of 1871, and this court cannot hold that he has a right to pay that debt without not only attempting to withdraw, but by actually withdrawing, the subject of the decision of the State court from its operation. The judgment is conclusive not only of the matter actually passed upon, but also of

"connected qualifying matters, which if produced would change or impair the legal force and effect of the cause of action itself, on which the judgment was rendered."

Would not the pledge of 1875 have this effect on the pledge of 1871, which plaintiff says was the cause of action in the former suit?

Haas v. Taylor, 80 Ala. 459.

Counsel for appellee in the court below undertook to get around the effect of the argument advanced above by saying:

1st. That it is sophistical but likely to mislead the judgment, and

2d. That the judgment in the State court was a judgment on demurrer. But granting that it was a judgment on demurrer, as was decided in Coffin v. Knott, and other cases cited, *supra*, if a man sees fit to set up his title by his pleading so that the court can say as a matter of law whether or no he has any, its judgment on that subject—namely, his title, is as conclusive as if in an action involving the title, the facts relied upon to establish it had been presented by an agreed state of facts. And this is common sense and justice. If A claimed a horse under a dozen different titles

no man would be so wild as to contend that he could bring a dozen different suits, one following the termination of the other, to recover such horse. To permit such a thing to be done would overthrow the foundation elements of justice upon which rests the maxim, "*nemo debet bis vexari pro una et eadem causa.*" If it could not be done in such a case, *a fortiori* it should not be tolerated in a case where he relies upon the same title relied upon in the former case, the original purchase, and seeks to get rid of an adverse judgment rendered on that title, on a defense that the property had been in the adverse possession of the defendant without any recognition of his, plaintiff's, title for more than six years before he commenced that suit, and therefore had ceased to be his property, and had become that of defendant, not by setting up a different title, but by setting up a recognition of that title subsequent to the one set up in the former suit, but many years prior to the commencement of that suit. If such a thing could be done we must reverse the rule declared by Mr. Broom, in his work on Legal Maxims, marginal pages, 324–5.

"If mistake in practice or inadvertence furnished reasons for a new "trial it would encourage litigation and reward ignorance and careless- "ness at the expense of the other party, and therefore our law in such "cases wisely acts upon the maxim, *interest republicae ut sit finis "litium.*"

But there is no foundation for the assertion that the former judgment was rendered on the demurrer, as we think we have demonstrated. The vesting of title in appellant was, as we have seen, asserted both by a demurrer to the original bill as amended and by setting it up in the answer; the cause was submitted on the pleadings and proof and the chancellor expressly puts his decision on the ground that the evidence failed to show any recognition of appellee's title by appellant within six years before the commencement of that suit. In his opinion he never once alludes to the pleadings; if they were defective he does not consider the defects; he bases his judgment on the facts and nothing but the facts, and they are the same facts upon which appellee

here relies, and that judgment is, that on the facts, appellee had, at the commencement of the suit in the State court, no title to the stock here involved, and for that reason his bill was absolutely dismissed.

Record, pp. 287, 289.

That judgment is what we claim is a bar. The Supreme Court rendered no judgment except simply to affirm that of the chancellor, but finding specially that the evidence did not entitle plaintiff to relief, and that affirmance could take nothing from its force or effect as a bar to another action; if no appeal had been taken from it, it would have had the same force and effect; certainly, the affirmance detracted nothing from its operation.

The counsel for appellee in the court below relied upon and used extensively, *Billingslea v. Harrell*, 11 Ala. We have shown this case overruled in Boyd v. Beck, 27 Ala. 703; Marlow v. Benagh, 52 Ala. 112; McGuire v. Van Pelt, 55 Ala. 350.

Another case cited in this connection, *Hanchey v. Coskrey*, 81 Ala. 149, distinctly recognizes the principle contended for by us, that is, that if in the former suit, there had been an inquiry into the title of the property sued for, the judgment there rendered would have been conclusive. On this point *Gould v. R. R. Co.*, 91 U. S. 533, is also much relied upon by appellee's counsel. The point actually decided in that case was, that the judgment in the former suit was a bar to that suit, although the former judgment had been rendered on a demurrer. That case also declares that a former judgment settles not only those things upon which a court pronounces judgment, "But every point which properly belonged to the subject of the allegation"—in this case the title to the property—"and which the parties exercising *reasonable diligence might have brought forward at the time.*" It also declares that where facts are set out in pleadings and a judgment on a demurrer, the judgment rendered in the cause "Is just as available to the opposite party as if the admission was made *ore tenus* before a jury." If this

suit had been in a law court and the jury had found specially the facts set up in the amended bill in the State court, and thereupon the court had found that the title was vested in appellant, could appellee have brought another action by simply setting up the subsequent recognition? For that is all it amounts to at last. The pledge of 1875, or any one thereafter is available only for the purpose of defeating the title asserted by defendant as the result of lapse of time. We do not think any one would contend for such a proposition.

Smith v. McCool, 16 Wall. 562, shows the distinction very clearly.

But we insist that the identical state of facts now before this court were *sub judice* in the State court, that that court was compelled to pass upon the question whether these facts were sufficient to entitle appellee to any relief, and that it did pass upon it. It is not denied that all the evidence before this court was before the State court, and it would be useless to deny it, for the evidence in both courts is before this court, and a comparison will show it to be the same in substance and in fact, and the evidence relied on in the court below to establish a recognition, is found in the depositions taken in the State court. Note of Testimony, Record, p. 71.

The Chancellor's decree was rendered in vacation and was one of absolute dismissal. The rule adopted by our Supreme Court, as by this court, is, that in such a case, on appeal, the court must examine the whole record, and if the facts entitle the party to relief, but on account of defective pleading he cannot obtain it in that particular suit, the judgment of the lower court must be reversed with instructions to dismiss the bill without prejudice, or in this State the appellate court may reverse the decree of the lower court, and itself dismiss the bill without prejudice. The facts now before this court were *sub judice*, and the State

Court was compelled to determine whether these facts entitled appellee to any relief.

House v. Mullen, 22 Wall. 42.
Cameron v. Abbott, 30 Ala. 416.
Munchus v. Harris, 69 *Ib.* 506.
Gilmer v. Wallace, 75 *Ib.* 220.
Glass v. Glass, 76 *Ib.* 368.
Kendig v. Dean, 97 U. S. 423, 426.
Van Norden v. Morten, 99 *Ib.* 378, 381-2.

The principle above asserted was well understood by the counsel for appellee in the State court, and in the argument made by one of them—the same who is the leading counsel for him in this case—on the application for a rehearing before the State Supreme court, it is urged that that court should reverse the decree of the lower court and qualify the dismissal, on the ground, that if that was not done the decree would bar another action even by a bill setting up the subsequent recognition of the trust.

See Exhibit 4 of arguments of appellee's counsel in State court. Record, p. 355, *et seq.*

In that argument it was urged upon the Supreme court, that the proof entitled appellee to recover, that the decree was a dismissal on the merits without allowing him an opportunity to amend, that at most, it should have been a dismissal without prejudice, in order that he might have a chance to file another bill. Appellee in that suit directly pressed upon the court the consideration of the sufficiency of the evidence to entitle him to relief. The court, as it was bound to do anyway, being thus argued, did, to use its own language, "examine and scrutinize the testimony in the record, with very great and painstaking care;" it recognized that it was its duty, if the evidence showed that appellee was entitled to any relief, to reverse the cause and dismiss the bill without prejudice; and, after such investigation, it deliberately decided, that the evidence—the same that is before this court—did not entitle appellee to any relief at all. Whether the evidence did entitle him to relief the court was urged, and bound to determine, and if they concluded it did, it was bound to dismiss the bill without prejudice, and

if they concluded it did not, to simply affirm the decree of the lower court. By affirming that decree it as effectually adjudged that appellee on that evidence was not entitled to any relief, under any circumstances, as if it had rendered a decree declaring as much *in haec verba*. The Supreme court then did by their judgment determine, that, on the very evidence now before this court, the title to the stock in controversy had become vested in appellant. That question was presented to them, and, as we have seen, they were forced to decide it. In determining whether the decree should be one without qualification or one without prejudice, that court was forced to determine and adjudge whether these facts entitled appellee to any relief. They adjudged that they did not, and it is conclusive of a subsequent suit on the same facts. This force and effect must be given to that judgment. If it were not the rule of courts in such cases making it their duty to dismiss without prejudice, where the evidence authorizes any relief, it would be absolute foolishness, for why reverse the decree of the lower court and qualify the dismissal, if the rights of the party would be the same without the qualification as they would be with it. That this is the logical result of the rule established is, to our minds, conclusively irresistible.

In connection with the points made above, we must not overlook the well settled rule that it is the duty of the Federal courts to give to the judgments and decrees of a State court the same force, effect and operation which they would be given in that court. It is perfectly evident from the undisputed testimony that appellee's moving to Tennessee was not in good faith; that he went there only for the purpose of giving this court jurisdiction of this suit, and that the whole scheme is an effort to have this court review and reverse the judgment and decision of the State court. If there had been any hope that the State court would not have held that the former suit was a bar to the second, no one from reading the evidence could believe that there would have been an attempted change of domicil.

Hampton v. McConnel, 3 Wheat. 234.

Mills v. Duryee, 7 Cranch, 481.

Cheever v. Wilson, 9 Wall. 108, 123.

Counsel for appellee in the court below also ruled on the following authorities which we will briefly review:

Mondel v. Steel, 8 M. & W. 858, was an action on a contract, for not building a ship according to certain specifications. It was claimed by reason of such failure that on a certain voyage it became so much strained that it had to be repaired, and plaintiff lost the use of her during the time, and for this, damage was claimed. In a former suit by the defendant for the contract price the present plaintiff had set up his failure to build according to contract, and had thereby reduced his recovery. The court held, that as the only reduction defendant did or could have obtained in that suit was the difference between the real and the contract price of the ship, the plea was bad, saying:

"But all claim for damages beyond that on account of subsequent necessity "for more extensive repairs could not have been allowed in the former ac- "tion and may now be recovered."

It is only as limiting the right of recovery to subsequent damages that this case can be sustained at all.

Baird v. U. S., *supra*.

1 Herman on Estoppel, § 222.

Harding v. Hale, 2 Gray, 399, was an action on a special promise to pay certain debts of the plaintiff. In a former suit for goods sold, *assumpsit*, defendant had set up that he had made this special promise for a part of the price and had otherwise paid the remainder. Of course it was held that such former judgment was no bar to the second action, that judgment had been obtained by setting up the very contract sued in the second as a *pro tanto* extinguishment of the debt. The court very properly held that he could not deny the existence of the special promise, that he could not contradict the averments of his plea relied on in the first suit, just as we say appellee can not now assert that the pledge of 1871 was extinguished by that of 1875.

In *Fitzpatrick v. Featherstone*, 3 Ala. 40, the court simply decided that where a bill was filed which sought only for an injunction and was not so framed that the plaintiff could obtain any other relief, its dismissal would not bar an original bill for relief in which other questions shall be presented than those litigated in that case. This case lacks a great deal of deciding that where a party owes two debts secured by separate mortgages on the same property, that he can file a bill to redeem from one of them and on having it adjudged that he is not entitled to redeem, that he can then sustain another suit for redemption from the second; or that where a mortgage is made to secure one or more debts, he can file a bill to redeem, and after having obtained an adverse decision on the ground that the title to the property had been transferred to the mortgagee by adverse possession, he can then file another bill putting in issue the same title, only alleging a recognition of his title within time to remove the bar of the statute. To permit this would be readjudicating the very thing theretofore decided, namely, that the statute had vested the title in the defendant.

Campbell v. Butts, 3 Comstock, simply decides that a judgment in an action for one slander does not bar an action for another slander.

In *Gist v. Davis*, 29 Am. Dec., no question of title was involved; a former bill for injunction had been dismissed solely because it did not appear that plaintiff was interested in the subject matter of the proceedings sought to be enjoined. In the new case it did appear that plaintiff had indemnified one of the parties to the proceedings and the bill prayed the cancellation of the bond. The opinion is not that of a unanimous court, but of a divided one, is contrary to the current of authority and is entitled to but little weight.

In *Londonderry v. Baker*, 3 Giffard, 128 (opinion by Vice-Chan. Stuart), it was plead in bar that an order had been made in a former suit, by the same plaintiff against the

same defendant for the same relief, allowing a demurrer. The plea was held defective because it did not allege that the allegations of the former bill were the same as those of the second. Here there is no such defect. In the answer of defendant and exhibits thereto, all the allegations and pleadings in the former suit are fully set forth, and are shown to be in substance and legal effect the same, and in their efficacy to have authorized the same relief which is sought here, if plaintiff was entitled to it; especially in view of plaintiff's right and *duty* to have resorted to the power of amendment in the former suit, which is so liberally bestowed by our statutes.

In conclusion on this point, we beg to call the attention of the court especially to the distinction between the bar of a judgment, and the estoppel created by that judgment. This distinction has been lost sight of by counsel for plaintiff. It is clearly stated in 1 Herman on Estoppel, &c., § 106.

"Where a cause of action is the same in two suits, a prior judgment in "one will be a bar to the other. But where they are different, though the "point in controversy is the same, the prior judgment is no bar to the sub- "sequent action, ***but the judgment is evidence to prove such point.*** While "a prior judgment may be no bar strictly and technically speaking where "the cause of both objects are not identical, it does not follow that either "party in the subsequent suit can be allowed to contradict what was ex- "pressly adjudicated in the first; and in this country the principle is well "settled that the judgment of a court of competent jurisdiction, directly "upon a particular point, *is as between the parties conclusive in relation "to such point*, though the subject-matter and object of the two suits may be "different."

The point in controversy in the former suit was the right of appellee to redeem this stock and the title to the same. It was expressly decided that he had no such right and that the title to the stock had vested in appellant. Even conceding all that appellee claims, that this is an entirely new cause of action and the principle quoted above would be fatal to his right to recover. He was a party to a law-suit begun in 1884 in which appellant asserted that the title to

this property was in him; on that point he permitted the court to render a judgment finding that appellant did have such title. Appellant pleaded that judgment as a bar, his plea has been overruled; then he sets up in his answer his title acquired by that judgment, and introduces the record of the State court as evidence; that record sustains that defense; it shows that the right of appellee to redeem the stock in question in 1884, and his title to the same, was directly passed upon in a suit between the same parties; even conceding the cause of action in the two cases is different, still the same points are involved in each case; the right of appellee to redeem, and his title in 1884 to the property involved, and that judgment on these points is, as evidence, conclusive. It was adjudged in 1884 that he had no right to redeem, that he had no title to the stock; it can not now be adjudged that he has, on the facts stated in his bill, without re-opening the very questions decided against him in 1884.

But the former judgment is more, it is a bar. The cause of action is the same, the fact that a recognition of the trust is alleged in the second bill that was not alleged in the first, no more changes the cause of action than in a second suit on a promissory note would an allegation of a payment within six years, make that a suit upon a different cause of action from the one set out in the first complaint, where there had been no such allegation. The trust relationship, if any existed between appellee and appellant, was created in 1871, the other acts were but new recognitions of that relationship, if there were any such acts. The cause of action in each suit was the right of redemption growing out of that relationship. The learned author quoted from above, in the same volume, section 121, says:

"Suitors are bound to prepare and present their cases in a proper man-
"ner, and cannot allege their own carelessness or ignorance as a cause for
"being relieved from its consequences. A defendant can not escape from
"the consequences of an adverse judgment on the ground that he had a good
"defense in fact, and relied inconsiderately on an untenable point of law;
"and plaintiff is precluded from regaining his *mistakes or omissions* by
"recourse to another action, unless under rare and peculiar circumstances."

If this be the law, can a suitor be relieved from the consequences of his carelessness and ignorance in the preparation of his first suit, whereby instead of alleging his whole case he alleged only a part of it? Can a plaintiff any more than a defendant escape from the consequences of an adverse judgment, because he inconsiderately relied on the untenable point of law that the statute of limitations did not run against the pledgor, instead of presenting the good reply in fact, which he now alleges he had, namely, a recognition of the trust within the six years? We think that each of these questions must be answered in the negative. Were it otherwise, the state of things so forcibly presented by Chancellor Kent in the opinion, heretofore quoted from, would arise.

"Men would never know when they might repose in security on the de-"cisions of courts of justice, and judgment might cease to be revered as be-"ing no longer the end of controversy and the evidence of right."

We refer to the following additional authorities on the effect of the former judgment.

Parrish v. Ferris, 2 Black, 606, 610.
Nichols v. Levy, 5 Wall. 433.
Goodrich v. The City, *Ib.* 563.
Lumber Co. v. Buchtel, 101, U. S. 638.
Life Ins. Co. v. Bangs, 103, *Ib.* 780.
Louis v. Brown Township, 109, *Ib.* 162.
1 Herman on Estoppel &c. §§ 119, 122, 123-4-5.
Dewey v. Peck, 33 Iowa, 242. 43, *Ib.* 602.
Greenup v. Crook, 50 Ind. 410, 419.
Betts v. Starr, 5 Conn. 550, 553.

Originally appellee in the State court based his relief upon the identical pledge set up in the present suit, that of 1875. He afterwards abandoned that, and by amendment, set up the pledge of 1871. Under the decision of *Bangs v. Ins. Co.*, *supra*, the effect of the judgment is the same as if he had proceeded on his original bill.

If the law is not as we insist it is, there can never be any end to litigation. If appellee has been adjudged entitled to no relief in this case, because of the bar of statute, he can

the day after his bill is dismissed file another bill in the State court alleging a recognition in 1883, and so on to the end of time. When he submitted the question of his title to the stock to a court upon a state of facts framed by himself he said in effect—

"I claim this stock, that I have a right to redeem it, here are the facts upon which I base my claim and title; the defendant claims that these facts give me no right and show title in him; now decide between us."

It does seem that the decision made against him would be conclusive, that at the commencement of the former suit he had no such right, and that the stock was the property of appellant.

Suppose it had been decided in that case that he had the right to redeem, could appellant have then commenced another action, say detinue, and have recovered the stock back from him, by claiming, that, while it was true, the court had decided under the facts set out in the pleading, that appellee did have the right to redeem, yet he, appellant, had a transfer in writing, made in 1883, of the same stock, founded upon a valuable consideration; that the former suit did not involve his title under that transfer, and it was not within the issues made by the pleading, and therefore he could sustain his action on that title. We do not think any one would be so reckless as to contend that appellant could maintain such an action. Are a plaintiff's rights greater than those of a defendant? Do not the same circumstances that make a judgment in favor of a plaintiff, operate as an estoppel against a defendant, make such a judgment if in favor of a defendant, operate as an estoppel against the plaintiff? Is not the plaintiff as much bound to present his whole case and all the title he relies upon to recover as is the defendant to present all the grounds of defense? If this suit is sustained there must be a negative answer to each of these questions, and a rule must be established by this court declaring that the same law does not apply equally to plaintiffs and defendants, and that plaintiffs have rights which are denied to defendants.

But we insist that appellee's bill should have been dismissed on the facts even if the court should hold that the judgment in the State court is not a bar to this. As we have said, the evidence here is the same that it was in the State court. In the State Supreme Court, Chief Justice Stone, in reviewing the evidence, says:

"I find not a semblance of proof that at any time after the spring of 1875, "any credit was extended to F. M. Gilmer or to any of the firms with which "the latter was connected on the faith of the stock in the Elyton Land "Company, as a security. I do not find it was ever mentioned between the "parties or had in contemplation in connection with any of their dealings "when they took place; on the contrary the proof is, that whenever any "credit was extended by Morris or Morris & Co. to F. M. Gilmer, either "for himself or for any of J. N. Gilmer's firms, other sources of payment were "looked to and stipulated for." Record p. 180.

In *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555, 578, the doctrine we contend for is expressly declared.

OBJECTIONS TO TESTIMONY.

Objection was made in the court below to the answer as evidence, and it was insisted that the bill waived answer under oath, and by force of Equity Rule No. 41, the answer was not evidence.

An examination of the original bill will show that no where in the bill is answer on oath waived. Attached to the bill is a note which undertakes to waive answer under oath, but we submit that this note is not a part of the bill. "If complainant, in his bill, shall waive answer under oath," is the language of the rule. This same rule requires a note at the foot of the bill, where interrogatories are contained in the bill, which shall specify which interrogatories each defendant is required to answer, and Rule 42 to exclude any such inference as is here attempted to be drawn, expressly provides that

"The note at the foot of the bill, *specifying the interrogatories* which each defendant is required to answer shall be considered and treated as part of the bill."

It certainly requires neither argument nor authority to show, that but for Rule 42 the foot note authorized by Rule

41 in regard to interrogatories would not be a part of the bill, for if that were so, why make Rule 42. And this is very clearly illustrated in the Rule of Practice in the Alabama Chancery courts, which appellee's counsel inadvertently followed in this case, which authorizes in those courts, the waiver of oath, as is here attempted to be made, and declares the foot note to be a part of the bill, just as Rule 42 does the note in regard to interrogatories in the Federal courts.

Rules of Chancery Practice, No. 12, Code 1886, p. 812.

If the foot note, waiving answer under oath, is a part of the bill, why make a rule declaring it to be so. It is manifest, that in each case, the court thought it necessary to declare by a rule, made pursuant to their authority, what the effect of the foot note should be, in order to make it part of the bill.

And why should the court specify in Rule 42 that "the foot note specifying the interrogatories" should be a part of the bill if it were intended to also include the waiver of oath therein.

The maxim, *inclusio unius exclusio alterius* applies, and upon the reason of the thing, as well as upon the construction of the rules, the waiver of oath cannot be by foot note.

The waiver of oath, to affect the answer as evidence, must be in strict conformity with the rules, and it has even been held that the waiver of oath does not take away the defendant's right to answer under oath, nor change the effect of the answer. Wallace, J., in Woodruff v. Dubuque, etc., R. R., 30 Fed. Rep. 93.

Appellee objected to the declarations made by the appellant to Col. Troy as to how he held and claimed the stock in 1875, when levied on by Farley.

This evidence is admissible as a part of the *res gestæ*. Appellant in possession of the certificate of stock, his declarations *ante litem motam*, are clearly admissible in his own favor to show the manner of his holding as has been repeatedly decided in Alabama.

Abney v. Kingland, 10 Ala. 355.
Glaze v. Blake, 56 Ala. 379.
Daffron v. Crump, 69 Ala. 77.
Cases Cited 1 Brick. Dig. 843, § 558.

And this being the settled rule of evidence in civil cases in the State courts, is binding on the Federal courts.

Wilcox v. Hunt, 13 Pet. 378.
Vance v. Campbell, 1 Black 427.
Wright v. Bates, 2 Black. 535.
Bryan v. Bindley, 1 Wall. 66.

THE CASE ON THE PROOFS.

We will now discuss the case made by the pleadings and proofs in two aspects :

First. Has complainant shown any title to the stock ?

Second. Was there any pledge of the stock in 1875, and has any subsequent recognition of any title to, or trust in the stock been shown since that time ?

The original transaction in this case is made clear by the depositions of appellant and John T. Milner in this cause, and F. M. Gilmer in the State court. Appellant bought $100,000 worth of land where city of Birmingham is now located, and after his purchase, he agreed to let other persons, including F. M. Gilmer, father of appellee, come into a corporation which he proposed to organize, and thereupon appellee, for his father, signed the declaration of incorporation for 120 shares of the stock of the Elyton Land Company, which the appellant paid for, by a conveyance of the land which he had purchased. All of the stock of the Elyton Land Company, except the portion which the land owners were to receive, belonged to appellant in fact, and the agreement which he made with the other persons was no more than a privilege he gave them of coming in, by paying him 50 cents on the dollar of the face value of the stock to be issued for the land. (See amended bill in State court, par. 1, Record, p. 165.) The land was conveyed by appellant to the corporation in full payment of the subscription of $200,000, its capital stock, and if the contract was as stated by appellant he never did acquire any right to the

stock; for his subscription, if he relies on that, was for $12,000, and appellant agreed to let him have the $12,000 of stock for $6,000. It is no where pretended that appellant agreed to advance money to buy land for appellee. Appellant buys the land for himself, conveys it to the corporation for $200,000, its whole capital stock, and then takes all the stock certificates, with the exception stated, into his possession or control. How could appellee or his father acquire the right to $12,000 of stock for $6,000, except under an agreement with appellant to sell it to him for that price? The Land Company never did agree to, nor could it sell the stock at 50 cents on the dollar, though it might take land at a price agreed upon; and then appellant could sell his stock, or agree to sell it at such price as he saw fit. The uncontradicted proof is that appellant never paid a dollar in money for his stock, he had bought land for $100,000 which he sold to the company for $200,000, and he agreed to let the other parties into the company upon their paying him 50 cents on the dollar for the stock they were to get from him, but for which certificates were issued in the names of the several parties, but actually delivered to appellant.

The bill avers, Par. 1, that orator being a subscriber for 120 shares of Elyton Land Company's stock, which was issued at 50 cents on the dollar, "made an agreement with the said Josiah Morris that he should advance the money, $6,000, necessary to pay for said stock as required by said company, and wait upon orator for repayment, and hold said stock as a pledge for such repayment."

There is no proof to support this averment, but, on the contrary, the proof shows that the stock was not issued at 50 cents on the dollar, but was fully paid; that the company never did acquire, nor did appellant ever make any advance of $6,000, or any other sum to pay for it. Appellant conveyed land which the uncontradicted proof shows was his own, and took the stock of the company, including that issued in the name of appellee.

Dep. F. M. Gilmer, Record, p. 179.
Dep. J. T. Milner, Record, 140, 142, 146.

The evidence of appellee, and of his father, F. M. Gilmer, in the State court and in this cause, and of appellant in both cases, shows that the only contract ever made was, that appellant agreed with F. M. Gilmer, that he, appellant, would let him, F. M. Gilmer, have 120 shares of Elyton Land stock for $6,000, when he paid for it. It is true that appellee insists that the agreement was made by his father for his use and benefit, but the only agreement ever made, was made by the father. The original agreement is proved by F. M. Gilmer. After reciting how the land was acquired, he says, that "Powell Morris and others, did agree to distribute under a joint stock company, to such parties as they might select, the interests in these lands. I was one of the parties to whom the distribution was to be made, but being president of the road, and knowing my embarrassments, pecuniarily, I requested of Mr. Josiah Morris that the portion to be allotted to me be given to my son J. N. Gilmer, the complainant, which was done, and a certificate for one hundred and twenty shares of one hundred dollars each, was issued to J. N. Gilmer, the complainant, and remained in the possession of the company as security for the payment of six thousand dollars. The six thousand dollars was for full payment of the one hundred and twenty shares. I state that the certificate remained in possession of the company because such is my impression. I do not know it, because I was absent. The stock was to be given, and was given to my said son for his own use and benefit, and was not, in any way, to be held in trust for me. Mr. Morris agreed to advance the money for the purchase of the lands, and therefore held these certificates of stock as collateral payment for the money advanced for the lands. Mr. Morris was really the company. He held all the papers and made all the transactions and agreed to pay for the stock, in the manner above set forth. The security given for this advance was the stock certificates. Mr. Morris agreed to advance this money, and did do it, and held the certificates of stock as security for such advance. The first and original

certificate of stock was deposited with Josiah Morris and for the purpose above specified."

Dep. F. M. Gilmer, Record, p. 179.

Appellee states the original arrangement as follows:

"I do know of the Elyton Land Company and the issuance of a certificate for one hundred and twenty shares of its stock to me. The amount of the stock so issued was $12,000 00 in one certificate for 120 shares--$6,000.00 was required to be paid for said stock. Mr. Josiah Morris agreed to advance the money required to pay for said stock, upon the security of the certificate for said stock, which was to be retained by him until the $6,000.00 was repaid. Such agreement was carried out and the original certificate for 120 shares of stock was left with Mr. Morris as collateral security for the $6,000.000 advanced to pay for the stock."

Dep. J. N. Gilmer, Record, p. 181.

Appellant's version is as follows:

"The agreement was that I was to let Mr. Frank Gilmer have one share--afterwards 120 shares--which I was to carry for him until he could pay for it, and after he paid for it, it was his stock, but he asked me to let it be put in the name of J. N. Gilmer, his son, because he was embarrassed; and one of the principal reasons was that he was president of the South & North railroad"

Dep. Josiah Morris, Record, p. 203.

Ibid, Record, pp. 118, 119.

Do these facts show anything more than an agreement on the part of appellant to sell the stock to appellee upon his paying $50 a share for it? How could any title vest under this agreement?

When testifying in this cause F. M. Gilmer states the original agreement as follows:

Q. Do you know of any arrangement being made about the payment for that stock?

A. I do.

Q. Who made that arrangement?

A. I made it.

Q. With whom?

A. Josiah Morris.

Q. How much was the stock to cost?

A. Six thousand dollars.

Q. Was that the arrangement with Mr. Morris?

A. It was that Mr. Morris was to advance the money for it, and hold the stock as collateral security for the advance.

Q. Well, was it carried out; did he advance the money?
A. He did.
Q. About what time was that; was it before the stock was paid for?
A. It was." Dep. F. M. Gilmer, Record, p. 74.

Appellee testifies that his father made this agreement, and he then says:

"Mr. Morris agreed to pay for it and hold the stock as collateral for its payment.
Q. Was any time specified how long he was to carry it?
A. No sir.
* * * * * *
I left it in the hands of Mr. Morris as a security for its payment, and not only as a security for its payment, but as a basis of credit for the business I was then conducting." Dep. J. N. Gilmer, Record, pp. 88, 89.

The agreement was made with F. M. Gilmer, and this agreement, as testified to by him, is so reasonable and probable, and so consistent with what would occur where a banker agreed to sell speculative stock, which he owned, to an impecunious friend, that upon its face it shows it was a contract for a sale.

No title to the stock ever vested in J. N. Gilmer, and neither of the transactions amounted to a pledge; for a pledge of necessity requires that title to the property pledged must be vested in the pledgor.

Almost an identical contract was under consideration in this court in the recent case of *Davison v. Davis*, 125 U. S. 90, which was a bill filed to redeem certain stock alleged to have been pledged, and it was there held that the contract was either "a conditional sale or an agreement to sell on performance of the condition," and it is also held that the only equitable remedy to which the plaintiff was entitled was relief from the condition, or specific performance.

Appellee's every action and whole conduct from 1875—we might say from 1871 to 1884—is entirely irreconcilable with the theory that he believed he had any interest in the stock.

The appellee never paid one cent on the stock, and never even gave any obligation or made any promise to pay. He made no effort to sell any part of it, and the sale that was made, the benefits of which he now claims, was brought

about without even his knowledge, for, according to his testimony, he knew nothing about it until it had been effected. Appellant shows clearly by his evidence that he never regarded appellee as the owner of the stock, but that it was merely held in his name for the benefit of his father, the option to take, really belonging to the father, and F. M. Gilmer seems to have been the man who appeared in all the transactions concerning the stock, appellee never mentioning it, or exercising any authority over it, only coming forward when his name was to be signed for the purpose of effecting some object that he had not even been consulted about.

If appellee never was *really the owner* of the particular shares of stock, of which he alleges himself to have been the owner, his bill ought to be dismissed for that single reason without regard to any other obstruction to his right to relief.

We insist he never was *really the owner* of those sixty shares, nor any part of the 120 *shares* of which these 60 constituted a part, until the sale of 60 of the 120 to Linn, and the separation of the 120 shares into the 60 issued to Linn, and the other 60 to appellant, but in the name of appellee as directed by appellant.

All the facts which constitute or relate to the transaction resulting in the issue to appellant of the certificate to the 120 shares, in favor of appellee *as directed by* appellant, are shown by the evidence.

No certificate for the 120 shares or for any part of them was ever *issued or delivered* to appellee. A *delivery* to appellee was as essential to give him ownership of these shares, as delivery is essential to make out a parol gift of a chattel or chose in action. *Upon the whole proof as now before the court*, it is certain that there never was *a delivery* to appellee, and that *the dominion of* appellant over the certificates and shares was never parted with or surrendered. Without any parting with *the dominion* over these shares by appellant, there could not be *a delivery* of them to appellee.

Sims v. Sims, 2 Ala. 117.

Whatever may be *the form* of the certificates, yet if *the substance* of the whole fact is, that appellant retained *the real dominion* of the certificates and of the shares upon the agreement or assurance that *upon payment* to appellant of what he had paid to get these shares, these shares should become the property of appellee, then *such payment* was *a condition precedent* to the passing of the ownership of the shares to appellee.

It was insisted below that under the facts as stated, the relation of pledgor and pledgee was established, and *Markham v. Jaudon*, 41 N. Y. 235, was relied upon to sustain this contention. We submit that this decision is illogical, and is in direct conflict with the English and Massachusetts decisions on the same question.

In *Wood v. Hayes*, 15 Gray, 376, the question was passed upon. Lobdell, a broker, purchased stock on a margin for Wood, Lobdell paying all the purchase money but the margin of ten per cent. Lobdell afterwards pledged the stock so purchased to other parties and died. Wood, on a claim being made by Lobdell's administrator against him for a balance of account, claimed to be due Lobdell's estate, instituted the proceeding reported, and insisted that Lobdell having wrongfully pledged the stock, had thereby converted it and was liable for its value. But Shaw, C. J., denies this proposition, and on page 377, says:

"The doctrine of trover does not apply. Lobdell advanced the money to buy the shares for account of Wood, and held the shares in his own name. It stood on the footing of a contract. The contract was strictly conditional, to deliver so many shares on payment of so much money. The money was never paid and the title to have performance never accrued."

This case is approved in *Covell v. Loud*, 135 Mass. 41, which was a purchase of stock on margin, where the broker sold the stock without notice, and the principal brought trover, and the court held he could not recover.

It is true that the New York courts have held that the purchase by a broker on a margin, the broker holding the stock, constitutes the relation of pledgor and pledgee since

Markham v. Jaudon, 41 N.Y. 235, decided in 1869. (See cases cited in Covell v. Loud), *supra*. But this decision was made by a divided court, and we insist that it is not law and the dissenting opinions are alone consistent with established principles of law and justice. The Massachusetts rule is the only one consistent with the law of sales, and with reason.

The case of a sale for cash, or a sale on credit where the vendor or vendee is to perform some act, are strictly in point. The rule is well stated in *Lacey v. Hill*, L. R., 8 Ch. App. 921, where a broker, with his own means, purchased stocks for a customer and sold them without notice. Sir G. Mellish, L. J., says he can see no "difference between the purchase of stock or shares, and the purchase of wheat or cotton," and he says, in the case of these last named articles, if the broker had sold the property before the time he was authorized, he could recover the sum he had expended, and the customer would have a counter claim against the broker for the damages sustained. Both of the Lord Justices concur that the transaction was a simple case of principal and ~~trust~~ agent.

The case of Markham v. Jaudon, *supra*, has been approved and followed in New York by a divided court. But it is nevertheless at variance with the law of sales and vests title in the customer, although he never performs the condition by payment.

The measure of damages laid down in Markham v. Jaudon, which was the logical sequence of the decision, has been reversed by the New York courts in *Baker v. Drake*, which was twice before the Court of Appeals, (53 N. Y. 211; 66 N. Y. 518), and the dissenting opinions of Grover and Woodruff, J. J., in the former case are followed, and the measure of damages is now established at the difference between the price at which the stock was sold, and the cost of like stock within a reasonable time after notice of sale; (See 53 N. Y., pp. 216, 217 et seq.), and it is clearly established that the rule of highest value never applies, except where the purchaser has paid for the property before conversion.

In *Scott v. Rogers*, 31 N. Y. 676, (which was twice argued in the Court of Appeals) the defendant, as agent of the plaintiff, had, in violation of plaintiff's orders, sold wheat and was sued for a conversion. The case was not brought for more than four years afterwards, and the court held that the rule of damages was the highest market price between the time of the conversion and a reasonable time thereafter to bring the suit, and they sustained a finding that four months was a reasonable time.

And this court has declared in a like case, where a factor tortiously sold goods of his customer, that the value of the goods on the day of sale is the measure of the damages.

Brown v. McGran, 14 Pet. 479.

If the allegations and proofs brought this case within the Massachusetts and English rule, it is clear apart from the denials of the appellant, that appellee must fail from want of title, but even under the New York rule, can it be that a court of equity will aid appellee to indirectly recover damages, which a court of law would not give; that by coming into a court of equity he can assert a claim to property in the form of damages, which the law courts condemn as inequitable. As said by Rapallo, J., in *Baker v. Drake*, 53 N. Y. 220: "It may be well to remark here as anywhere, that the rule of damages should not depend upon the form of action."—See, also, pp. 216, 217 and 218; Markham v. Jaudon, *supra*, dissenting opinion Grover, J., p. 251; dissenting opinion Woodruff, J., pp. 253, 256, 267. Besides this, Markham v. Jaudon admits that if the relation was that of vendor and vendee the transaction would have been simply an executory contract for the sale of the stock, and the right to sell without notice would have existed.

Even if the New York rule in regard to a purchase on margins were to govern, there must be a distinction between that case and a purchase by the agent wholly with his own funds—which would be the case here, if appellee's contention was sound, or supported by proofs.

If appellee relies upon the Chattanooga agreemen, the

must fail for two obvious reasons: In the first place, he has not set it up, and in the second, the Chattanooga agreement between Stanton and others—Record p. 246—was superseded by another agreement between the Alabama & Chattanooga and the South & North Railroad companies, and Stanton, as representative of the A. & C. company, having violated this second agreement, and in bad faith secured options on the lands where Birmingham is now located, Milner waited until these options expired and then advised appellant to buy. The whole of the original transactions are made perfectly clear by the deposition of John T. Milner and the manner in which the various parties to whom appellant transferred the stock were to hold it.

See Record, pp. 140, 141, 142, 145, 146, 148.

This witness (Milner) got sixty shares of stock; he was the party who signed appellant's name to the Chattanooga agreement, without appellant's knowledge or authority, and he discribes how the stock was distributed:

"There was no understanding. I know this, that the entire two-thirds or three-quarters of that stock was at the sole disposal of Josiah Morris; that I paid none of the purchase-money for the land, nor did I agree to pay any of the purchase-money for the land, and that whatever he assigned me was at his own volition and was to be held as collateral untill I paid for it."—Record p 142.

Milner also shows clearly that the purchase made by appellant of the land was not under any agreement, but was made by appellant with his own money and without any condition whatever.

The deposition of F. M. Gilmer in the case tried in the State court, also establishes this proposition.

Record p. 190, answer to 6th interrogatory.

The appellee never acquired anything by the contract, and his father a mere privilege or option, to purchase.

There was never any obligation on the part of appellee to take or pay for the stock, (Record pp. 100, 120, 121), and we submit this offer was a mere gratuity on the part of appellant.

Chambliss v. Smith, 30 Ala. 366, 370.

In *Markham v. Jaudon, supra,* Mr. Justice Grover has made a clear exposition of the injustice of the claim presented in this case on page 251:

"Here the plaintiff had not paid for the stocks. He retained ninety per cent. of the purchase price in his pocket. The sum so retained, in consequence of the depreciation, would have enabled him to have gone into the market and purchased an equal amount of the same stock. If he wished to risk the future fluctuations of the market he should have done this.

"There is no such weight of authority in this State as to require this court to hold that the plaintiff could retain his money, incur no risk of loss from future depreciation and enjoy all the chance of gain from a rise in the market, the defendants, in the meantime, exposed to all the chance of loss without any possibility of gain. A doctrine so entirely contrary to justice and reason should never be sanctioned, unless sustained by such numerous judicial decisions as imperatively to require the court, while disapproving the rule, to apply the maxim of *stare decisis.*"

The remarks of Mr. Justice Rapallo in *Baker v. Drake,* 53 N. Y. 215, also apply with much force:

"This enormous amount of profit, given under the name of damages, could not have been arrived at, except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff would not only have supplied the necessary margin and caused the stock to be carried through all its fluctuations until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience."

And Mr. Justice Field in *Marsh v. Whitmore,* 21 Wallace, 179, has characterized a like transaction in very fitting terms. He says, p. 184:

"There is no doubt that the prices bid at the sale were all that the bonds were then worth, and there is no reason for imputing intentional fraud to the defendant.

"Under these circumstances he may very well have been justified in assuming that the complainant was satisfied with his proceedings. The fact that the complainant never felt himself aggrieved until the bonds of the company had risen to their par value, which only occurred after this court had adjudged, on appeal from the Supreme Court of the State, that the stockholders were personally liable for its debts, leads to the inference that the present suit was prompted more by a spirit of speculation than any sentiment that injustice had been done to him."

And Mr. Justice Somerville, in the opinion delivered by

him, shows that this was the view of the case taken by the Supreme Court of Alabama. After stating the object of the bill to be to redeem a pledge, he says:

"Or, more accurately speaking, *to hold the defendant liable for the appreciated value of the stock, upon the ground that he had sold it without authority and without any notice to the complainant, who claims to be the owner and the pledgor.* It is very questionable, however, whether the allegations of the bill will bear this construction, if subjected to proper criticism, and construed with requisite strictness against the pleader." (The italics are ours.) Opinion *supra*, pp. 25, 26.

If, upon the case made by appellee, it were possible to hold that he had any title or right to the stock, it is very clear, that having failed to make any demand within a reasonable time after the transfer to appellant in 1875 and after the sale by him in 1881, he cannot excuse his laches ~~as~~ and is barred.

Mardis v. Shackelford, 4 Ala. 493.
Kimbro v. Waller, 21 Ala. 376.
Pittsburg R. R. Co. v. Byers, 32 Pa. St. 22.
Battley v. Faulkner, 3 B. and Ald. 288.
Brashier v. Gratz, 6 Wheat. 528, 541.
Hayward v. National Bank, 96 U. S. 611.
Davison v. Davis, 125 U. S. 90.

See, also, cases cited on the subject of laches and delay, *supra*.

To hold otherwise would enable appellee without risk to enhance his recovery by his own delay and inexcusable and inexplicable laches.

Hayward National Bank was a bill filed to redeem certain shares of stock, which Hayward had pledged with the bank to secure an indebtedness, and which the bank had purchased at its own sale, under the pledge. The sale was made September 8th, 1868, and the bill was filed March 14th, 1872. This court held this delay of three and a half years too great. (P. 618).

"If Hayward was defrauded of his stock,—if the title did not pass from him or the bank because of the peculiar relations which the purchasers held to him and the property; if he had the right originally upon any ground to repudiate the sale and reclaim the stock,—it was incumbent upon him, by every consideration of fairness, to act with diligence, and before any material change in the circumstances and in

the value of the stock had intervened. No sufficient reason is given for the delay in suing. His poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights."

We submit that this case is on all fours with the present one. The stock here was transferred to appellant March 30th, 1875; the bill here was filed September 20th, 1886—eleven years and six months. Appellee alleges and proves that he knew of the transfer at the time it was made. The stock in Hayward v. National Bank increased in value from $15 to $70 a share, here it has increased from $40 to $4000, a share. Appellee never mentions it, nor did he ever pay or offer to pay any interest on the balance of the note for $4000 during all that time.

The recent case of *Davison v. Davis,* is also directly in point. There the plaintiff insisted that the contract amounted to a pledge, and the defendant contended that it was only a sale upon condition. The right of the plaintiff to demand the stock accrued 12th of November, 1877, the bill was filed 27th of March, 1883. Speaking of this laches the court says, pp. 94, 95.

"Davison, in his testimony, admits that no communication took place between him and Davis in relation to the stock after February, 1878. At that time he states that a conversation occurred between them in which Davis offered to carry his (Davison's) stock in the company until it worked out, but that nothing was said about the particular stock in question. The conversation, as he afterwards explained, related to 579 shares bought by him of one Johnson, and not to the 379½ shares. Another circumstance of weight is the fact that the stock would not sell, for more than twenty dollars per share until long after the note became due; and that afterwards, when Davis himself took hold of the road, the stock appreciated so as to sell for nearly or quite double that amount. It was after this appreciation of the stock in value, that Davison transferred his supposed interest to Mundy, who then made the offer to pay Davison's note and take up the stock. Under all these circumstances the laches of Davison and Mundy is a perfectly good defense against any claim of relief from the condition (if it was a sale upon condition); or for specific performance of the agreement (if it was an agreement for a sale).—In Brashier v. Gratz, 6 Wheat. 528, 541, Chief Justice Marshall said:

"This, then, is a demand for a specific performance, after a considerable lapse of time (five years) made by a person who has failed totally

to perform his part of the contract; and it is made after a great change, both in the title and in the value of that which was the subject of the contract; and by a person who could not have been compelled to execute his part of it, had circumstances taken an unfavorable direction. The reason why the party seeking relief in that case could not be compelled to execute his part of the contract, was his pecuniary inability to execute it—a circumstance which also existed in the present case."

And how does appellee attempt to account for the delay of eleven years and six months which has elapsed between the time when appellant had the stock transferred on the books of the company and the filing of this bill? He avers that there was a new agreement and a new pledge of the stock in 1875, which has been recognized and continued ever since by appellant.

In 1875 the stock was worth *forty dollars* a share.

In 1877 it was worth *twenty-five dollars* a share—Dep. D. S. Troy, p. 150.

In 1878 from $18 to $24 per share—Dep. A. W. Smith, p. 155; Dep. J. W. Sloss, p. 157.

In March, 1879, $25, and in April, 1879, $33 per share—Dep. T. L. Jones, p. 159.

In February, 1880, $40—Dep. D. M. Snow, p. 158.

In 1881, $100—Dep. Josiah Morris, p. 121.

In 1882 from $150 to $200—Dep. D. S. Troy, p. 150.

In 1885 $700 per share, early in 1886, $1,000, and in the winter of 1886-7, $3,000 to $4,000 per share—Dep. D. S. Troy, p. 150.

Appellee himself swears that continuously from 1871 to 1887 he had been insolvent and hard up. See his Dep. pp. 99 and 105. And yet for nine years, although he met appellant almost daily, he never mentioned the stock to him. See his Dep., Record, pp. 108, 109; Dep. F. M. Gilmer, Record, p. 82.

Not subject to any liability on account of the stock, free from all possible chance of loss, appellee views the decline of the stock to $18 per share with complacency, and accidentally hears in Birmingham in 1884, that it had become valuable, and then goes and demands it, and on the refusal

of appellant to deliver it, brings his suit in the chancery court of Montgomery for its recovey in 1884. Dep. J. N. Gilmer, Record, p. 96.

The stock is then, 1884, worth $300 per share, but appellee fails in his suit in that court, and in the Supreme court of Alabama, on appeal, meanwhile the stock is steadily advancing until, when this suit is brought, the sixty shares have increased in value from *one thousand and eighty dollars* to *sixty thousand*, and when the proofs in this cause were taken, the value, without dividends, was *two hundred and forty thousand dollars*, and the report of the special master shows that when the account was taken, the dividends and increments amounted to *one hundred and seventy-two thousand five hundred* dollars. Record, p. 387.

If these facts fail to lead to the inference that both these suits were "prompted more by a spirit of speculation than any sentiment that injustice had been done to him," we confess we are at a loss to conceive a case where the remarks of Mr. Justice Field would apply.

THE AGREEMENT OF 1875.

It is alleged and insisted that there was a new agreement entered into in 1875, and this new agreement is stated in two ways in the bill.

First, it is said that,

"Orator desiring on the formation of his said partnership with said Donaldson, to continue his bank account with said Morris & Co., and to obtain from them from time to time some accommodations by way of loans and discounts, arranged and agreed, in the early part of the year 1875, with the said Morris that the said stock should be held by him not only to secure such balance as was due him on the original purchase thereof but also for all indebtedness which the said firm of Gilmer & Donaldson might incur to him, or his banking firm of Josiah Morris & Co."

Par 6, Orig. Bill, Record, pp. 2, 3.

Again, after alleging the levy on the stock in 1875, the bill proceeds:

"That, upon such levy being made, orator entered into a new agreement with said Morris that he should pay said debt, or discharge said levy, and have the said stock transferred to him on the books of said

company, and hold the same as a pledge to him for the payment of the balance due on the original purchase and the sum necessary to be advanced to discharge said levy and all indebtedness which orator and his firms might incur in the future to him, or his banking firm of J. Morris & Co. That said Morris in pursuance of this agreement, which was accepted and acceded to by him, paid said judgment or discharged said levy, and on the 12th day of July, A. D. 1875, charged up the amount so paid to effect the discharge of said levy, $733.60, to the account of orator's said firm of Gilmer & Donaldson, with said J. Morris & Co., and also had, prior thereto, the said stock transferred on the stock book of said company to his name, and has since that time so held said stock."

Par. 7, Orig. Bill, Record, p. 3.

There is no proof as to the agreement in the early part of 1875, and the proof to support the allegation of the agreement of March, 1875, is as follows:

Q. State if anything occurred between you and Mr. Morris in 1875 in reference to that stock?

A. I was notified by my father that my stock had been levied upon under an execution of a judgment, in favor of one Mr. Farley, for the sum of $230. My father called on Mr. Morris and asked him to pay it up and to hold such judgment and have my stock transferred to him as collateral security for this indebtedness and any other indebtedness that I might be due him.

Q. Tell me how you know your father did that?

A. Because he told me of it himself.

Q. Who told you?

A. My father did.

Q. Is that the only way you know?

A. No, sir; Mr. Morris asked my father to ask me to come to see him; I called on Mr. Morris and stated that my father said he wished to see me in reference to the payment of this judgment, and that he had agreed with my father to pay this judgment and have the stock transferred to him upon the books of the Elyton Land Company, and to hold such judgment and the stock as a collateral security for that indebtedness and any other indebtedness I might be due him.

Q. You say Mr. Morris agreed to that!

A. Yes, sir.

Q. When was that, now?

A. I think it was in the spring of 1875—about March, 1875.

(Dep. J. N. Gilmer, Record, p. 90.)

It is manifest from the above agreement that it was not intended to cover any future indebtedness, but appellee

contends that such was the purpose and such the subsequent dealings between him and Josiah Morris & Co.

The proof shows that the sixty shares of stock were worth in March 1875 $2,400, (Dep. D. S. Troy, Record, p. 150; Dep. J. F. Whitfield, Record, p. 160) and appellee was then indebted to Josiah Morris & Co., outside of any liability on account of the stock, principal and interest, $3934.03. (Report of special master, Record, p. 383.) And yet it is insisted that this speculative stock, worth $1,500 less than his then indebtedness, was accepted by appellant as a pledge or collateral security for future advances to be made by his banking house, and was to be so held by him, indefinitely. It will be observed that appellee no where testifies that appellant ever agreed with him to hold the stock for any future advances, for the agreement, he states, is that appellant agreed "to hold such judgment and the stock as a collateral security for that indebtedness, and for any other indebtedness I might be due him."

The only evidence of any agreement as to future advances is that of F. M. Gilmer, the father, who testifies as follows:

"Q. Well, in your negotiations with Mr. Morris in 1875, on the occasion of the levy of that execution upon this stock, was there anything, and if so what, said in reference to the stock being security for any future indebtedness of J. N. Gilmer?

A. He was to hold the stock for that advance and for all future liabilities of the said J. N. Gilmer.

Q. To whom?

A. To Josiah Morris & Co., or the parties advancing, and for all the firms with which he might be connected. Dep. F. M. Gilmer, Record, pp. 77, 78.

Now, according to appellee's own testimony, which we have quoted above, his father, after he had made this arrangement, came to him and informed him of the agreement which he had made with appellant, and thereupon appellee went to see appellant himself, and made the other agreement he testifies to, in which nothing is said of future advances.

Appellee by his own admission with limited means and "hard up" all the time from 1871 to 1884, to use his own language, owning nothing tangible but this stock (Dep. pp. 19, 20), does not even know its value in 1875. Is it reasonable to suppose that a man hard pressed for money, possessing but one hope for the future, and that hope consisting of sixty shares of speculative stock, would be so careless and indifferent as not to know its value when he pledged it?

The depositions of D. S. Troy, J. F. Whitfield and the other witnesses show that the stock was not worth more than $40 per share in 1875, and yet appellee, when asked about its value, says:

"I suppose it was worth par; I never heard of any sales." (Dep. J. N. Gilmer, Record, p. 91.)

Continuing impecunious during all the following years, as is proved by his own deposition, he swears that he never once spoke to appellant about the stock until 1884, when he awoke from his long sleep of oblivion on this subject, and discovered that Aladdin had rubbed the lamp and Birmingham was a success.

During all these years he remains in quiet ignorance of the value of the only property on earth he claims to own; and when he learns of the large dividend, in 1884, appellee receives the first promptings of the spirit of speculation, which alike prompted his suit in the State court and this suit.

Appellee, although indebted to Morris & Co., in 1879 as J. N. Gilmer & Co., for $222.43, and although Morris & Co. dunned him repeatedly from 1879 to 1883, when he pays the last balance of this amount, $52.33, on October 3, 1883, he yet never says a word about this stock. Dep. J. N. Gilmer, Record, pp. 104, 105.

Between 1871 and 1886, by his own admission, appellee never mentioned this stock to appellant but twice; once in 1875 and again in 1884, before bringing the suit in the State chancery court, although he met appellant daily.

Q. Did you have any conversation with Mr. Morris in regard to the stock after the latter part of 1871?

A. I did in 1875, and I did in 1884.

Q. Those are the only two conversations you had since 1871?

A. It is all I can call to mind. Dep. J. N. Gilmer, Record, p. 108.

Appellee's father was financial manager for him and his various firms during all these years (Dep. J. N. Gilmer, p. 92; Dep. F. M. Gilmer, Record, pp. 73, 74); and although he swears that he made all of the financial arrangements for the various firms after 1875, which are relied upon as continued recognitions of the pledge alleged to have been made, he has no idea of the value of the stock in 1875.

When asked by appellee's counsel in regard to the value of the stock in 1875, he says:

"I do not think there was much demand for the stock until after 1875."

Q. I didn't ask you about it before 1875; I asked you about it after 1875. What do you think was its value after that?

A. I think it was worth par.

Q. That would make its value about $6,000?

A. Yes, Sir. Dep. F. M. Gilmer, Record, p. 78.

But when asked about its value at the time of his examination in 1886, he is clear:

Q. What do you think it is worth?

A. I think it is over twenty to one.

Q. That would make the stock worth $120,000 or over?

A. Well, yes. Dep. F. M. Gilmer, Record, p. 79.

The financial manager of the various firms thus places the value of the stock in 1875 at over twice its actual market value. No less than two indifferent witnesses testify that its value was not over $2,400.

Although pressed by appellee's counsel, this witness can give no act of recognition on the part of appellant after 1875, of any right or claim of appellee to this stock. The following is his testimony on that subject:

Q. Did he ever deny that trust to you?

A. He never did.

Q. Did he ever acknowledge it to you?

A. He did.

Q. Well, how late did he acknowledge it to you, would you say?

A. I regarded--

Never mind what you regarded. I am not asking anything about that. How late did he acknowledge it to you?

A. Well, I do not recollect the date.

Q. Well, was it after your bankruptcy, or how?

A. The last definite acknowledgment was when he agreed to pay this judgment of $237 or $235; it is some where there, I think; $237, I believe.

Q. Did you have no talk with him about the stock since 1875?

A. Well, I have, in talking about liabilities.

Q. What do you mean by definite acknowledgment, then; what did he say about the stock when you had these conversations?

A. When we had this conversation I asked him to pay this execution, and hold the stock as collateral for that and other liabilities that Jimmie might become liable for to him.

Q. Who is Jimmie?

A. J. N. Gilmer.

Q. You say you have had conversations with him since 1875 in reference to it?

A. I do not recollect any distinct conversation, but we have had very many talks on business matters, and he has always regarded it, in his conversation with me, that this is Jimmie's stock.

Q. What do you mean by regarded?

A. I mean that he acknowledged. I have never had him doubt it, or repudiate it in any way.

Q. Have you had him to acknowledge it?

A. Well, I do not know upon what higher authority he could acknowledge—

Q. I do not know, either; but I want you to answer my questions. If you think he acknowledged it, state how he acknowledged it; generally or specially?

A. He acknowledged it by regarding—

Q. How do you know how he regarded anything? How do you know how he regarded it but by what he said?

A. Well, Mr. Gunter, he said so much about it, he and I, that I do not recollect the verbiage.

Q. I do not ask for the verbiage. Did he say anything about it?

A. Yes, sir.

Q. Well, was it treated in these conversations as his property or the property of J. N. Gilmer?

Counsel for defense objects to question.

A. It was treated as Gilmer's. In no conversation did he claim it as his property.

Q. Do you mean, then, that the last acknowledgment made that the property was a security in his hands for the debts of J. N. Gilmer, was in 1875, or do you recollect that you had a conversasion after that?

A. That is the last definite conversation I can recollect of his saying that. Dep. F. M. Gilmer, Record, pp. 81, 82.

A court of equity is now asked, eleven years after the alleged pledge in 1875, relied upon in this case, and sixteen years after the original agreement alleged, and more than five years after the sale by appellant, to hold him liable for the highest value of a stock which has fluctuated in value from $16 to $4,000 a share, in the face of an admission in the bill and proof by appellee in his depositions that he has never paid for the stock, and for which he did not even offer to pay before bringing this suit.

Appellee alleges and swears that the original transaction was a speculative venture, based on the success of Birmingham, and his father swears to the same effect.

Original Bill, par. 4, Dep. J. N. Gilmer, Record, p. 88.

Dep. F. M. Gilmer, p. 78.

Appellant was to carry the stock forever, as appellee now insists, or until Birmingham was a success.

"Was any time specified as to how long he was to carry it?" is asked appellee by his counsel. "No, sir." Dep., Record, p. 88.

The $12,000 is paid by Appellant to the Elyton Land Company for stock in 1870 by a conveyance of land; he agrees to let F. M. Gilmer have the 120 shares for $6,000 in 1871, and up to this time the $6,000 has never been paid or tendered either by appellee or his father. Neither F. M. Gilmer nor appellee at any time agreed absolutely to take the stock, and from the inception of the transaction that neither of them has ever given or offered to give any acknowledgment or obligation to pay anything, is proved by their own depositions.

After March, 1875, when the stock was transferred by appellant to his own name after the levy, the stock declined in value until, in 1878, it was worth only $16 to $18 per share.

In 1879 it began to advance in price until 1881, when it was at par, and in 1884, having reached a value of $300 per

share, appellee then for the first time, makes a claim for the 60 shares and brings his suit for it in the State court.

Much has been said on the argument of this case by counsel for appellee about the injustice of appellant refusing to permit appellee to redeem the stock in controversy. Such criticisms are entirely unwarranted by the facts, and no one on an examination of the evidence, would for one moment believe that if the stock in controversy had gone down to one-thirtieth of its par value instead of appreciating to thirty times that value, that appellee would have ever troubled the courts with this case, nor would any one doubt that in such contingency, had appellant sued appellee for the several debts alleged by him, appellee, to have been secured by the stock as pledge, he would have plead the statute of limitations to such suit. If we are to believe appellee's own testimony, he never regarded or treated the stock as his own, and would never have thought of asserting any such ownership had it not been for its unprecedented rise. His conduct in the case exhibits a great deal of shrewdness. Between March, 1875, and the summer of 1884, he never said a word to appellant about the stock. If sued after six years for the balance due thereon, and the debts of Gilmer and Donaldson, whose account was closed in 1876, he could reply that he had made no acknowledgment of the debt, if the stock depreciated; if it appreciated, he could claim the right to redeem. This, we say, was the scheme, if the position assumed by his counsel be the correct one. To say the least of it, it was a very safe course to pursue. By it nothing was to be lost to appellee, and nothing was to be gained to appellant; it was as complete an illustration of the game of "Heads I win, tails you lose," as the mind can well conceive. It is a safe scheme for the so-called pledgor, and if he can obtain the aid of a court of equity to assist him in carrying it out, it will also be a most profitable one.

As said above, appellee, as shown by his own testimony, never treated or regarded the stock as his own, or that he had any interest it. To establish this position we will re-

view his conduct with respect to it from the beginning until shortly before the filing of the bill in the State court in 1884, as shown by his own testimony. In his testimony in the State court, he said he was not present at the organization of the Elyton Land Company, and did not know that any stock had been subscribed for in his name, until it had been done.

In answer to the first cross-interrogatory, he says:

"To the best of my knowledge and belief, the Elyton Land Company was organized in the first of 1871. I was not present at the organization. I did not know that any stock was to be subscribed for in my name until after the subscription. I think the subscription was made by Mr. Morris. My father informed me of it shortly after the organization of the Company." Record, p. 102.

To the second cross-interrogatory in the State court he says:

"Josiah Morris never made any promise to me to pay for said stock." Record, p. 182.

"Is that a correct statement of the facts?" he is asked in this case, and answers, "It is sir." "It was then correct and is now?" "Yes, sir." Dep. J. N. Gilmer, Record, pp. 102, 103.

He did not mention the subject to appellant, and it appears that the first time anything ever passed between appellant and himself in relation to it, was when the trade was made with Linn by which he took half of it and paid the $6,000.00. Appellee had nothing to do with this transaction, did nothing towards bringing it about, but when required to do so, signed his name to the transfer. He was not consulted about any of these transactions, but was treated as a mere figure head set up as the owner of the stock, without authority to exercise any dominion or control it.

Dep. of J. N. Gilmer, Record, p. 106, 107.

When the certificate for the sixty shares was returned after the sale and transfer of the other sixty, appellee again steps up and transfers it to appellant; in all cases doing as directed. This new certificate remained in appellant's possession without appellee's ever even mentioning the fact that he had it, or saying anything about it until it was

levied on under an execution in 1875. After that time he again remains entirely quiescent and never says or does a thing indicating that he ever thought that he had any interest whatever in the stock, until the summer of 1884, over nine years after the transaction of 1875.

Dep. of J. N. Gilmer, Record, p. 108.

During all of this time, he, acording to his testimony, supposed the stock was worth about par; knew, if his statements be true, that he only owed a few hundred dollars on the stock and was in embarrassed circumstances, even insolvent and tightly pressed all the time for money.

He admits that while Morris & Co. were dunning him repeatedly for a little balance claimed to be due from J. N. Gilmer & Co., although he denied that he owed it, he never once mentioned the fact he had this stock which he supposed to be worth at least par, although if such was a fact, the stock was worth much more than his indebtedness. He suffered himself to be importuned until, it is evident from his own testimony, he was annoyed by it, for a little balance of about $50.00 and in 1883 paid it, leaving in the hands of the creditors property worth much more than his indebtedness, without once mentioning that fact. It must be borne in mind that at no time does it appear from appellee's testimony, did he suppose that the stock was worth less than par.

Dep of J. N. Gilmer, Record, pp. 104, 105.

Mr. Billing, in his testimony, makes the same statement, as to the repeated dunning of appellee, and his failure to mention the stock.

Dep. of F. M. Billing, Record, p. 152.

From these circumstances we respectfully insist that no other conclusion can be reached, but that appellee's assertion of a claim to this stock is an afterthought, born of an idea that came into his mind after the stock had appreciated to such an unprecedented value, that perhaps there was a chance for him to make something for nothing, knowing that he had everything to gain and nothing to lose, being

even now, as admitted by himself, proof against an execution for costs, should judgment go against him.

Dep. of J. N. Gilmer, Record, pp. 99, 100, 105.

His every action and whole conduct from 1875—we might say from 1871 to 1884—is entirely irreconcilable with the theory that he believed he had any interest in the stock.

The appellee never paid one cent on the stock and never even gave any obligation or made any promise to pay. He made no effort to sell any part of it, and the sale that was made, the benefits of which he now claims, was brought about without even his knowledge, for, according to his testimony, he knew nothing about it until it had been effected. Appellant shows clearly by his evidence that he never regarded him as the owner of the stock, but that it was merely held in his name for the benefit of his father, the option to take, really belonging to the father, and F. M. Gilmer seems to have been the man who appeared in all the transactions concerning the stock, appellee never mentioning it, or exercising any authority over it, only coming forward when his name was to be signed for the purpose of effecting some object that he had not even been consulted about.

When we come to consider the case made by appellant by the proofs, it is perfectly manifest that no title ever passed to appellee.

The original agreement at Chattanooga fell through. Stanton endeavored to secure the lands, and then it was, that Milner, to prevent him from securing these lands, delayed the location of his line until his options expired and then came, told appellant of the situation, and advised appellant to buy the lands.

All the agreements had fallen through, appellant was the only man in Montgomery who had sufficient means to handle the enterprise, and prompted, as he swears, only by the motives of preventing Stanton from securing the lands and of having them in the hands of Montgomery people, Milner came to appellant, and thereupon appellant bought the lands and paid for them $100,000.

Dep. Morris, pp. 112, 113; Dep. J. T. Milner, pp. 143, 144.

No time is fixed when the agreement was made between appellant and F. M. Gilmer, but it is clear, from all the evidence, that it was after appellant had bought the land, for Milner states positively that all the original agreements, had fallen through, as does appellant, and appellant's statement, that there was a subsequent oral agreement, is directly supported by the declaration filed for the incorporation of the Elyton Land Company in December, 1870. Record, p. 198.

The Chattanooga Agreement, (p. 246,) was signed by John C. Stanton, D. N. Stanton, Wm. B. Greenlaw, Moses I. Wickes and Thos. O. Glasscock, whose names do not appear in the Declaration, and the names of Bolling Hall, B. P. Worthington, W. F. Nabers, J. R. Powell and Wm. S. Mudd, appear in the Declaration, while they do not appear in the agreement.

But another and more cogent circumstance is, that by the Chattanooga Agreement each of the parties is to have "an undivided one-tenth interest in said purchase, and to pay on demand one-tenth of the purchase-money." Upon the Declaration, appellee's name appears as a subscriber for 120 shares, which represents neither one-tenth of the purchase, nor does the subscription make him liable for one-tenth of the purchase-money.

So, by the record evidence, it is established conclusively that the Elyton Land Company was not organized under the Chattanooga Agreement, and it is equally clear that appellant made no agreement prior to the Chattanooga Agreement, for it was made in his absence and without his knowledge. Dep. Morris, p. 114.

Appellant in the State court and in this case by his sworn answer and his deposition, denies expressly that he ever made any agreement, or had any understanding of any kind with appellee at any time in regard to the stock. We do not refer to particular pages of his evidence, because the denials are repeated throughout the entire depositions.

His denials are corroborated by circumstances too cogent to admit of successful contradiction.

It was argued below, that it would make no difference to appellant for whose benefit the agreement was made to carry the stock or to pay for it, yet in his testimony in the State court this difference is made perfectly clear:

"Q. It was not a matter of interest to you in whose name it was carried?

A. It was a good deal of interest to me because at that time he owed me money.

Q. You say at that time Mr. F. M. Gilmer owed you.

A. $3,400.00 at the time of the issuing of the stock.

Q. What did you have as security for that?

A. I had a piece of land but it was worth nothing. He had it put in my name and sent the deed to me and I agreed to advance him $3,400.00." Record, p. 225.

Appellant testifies that, having made the purchase of the lands, he proposed to organize a company and agreed to let F. M. Gilmer have 120 shares of stock upon his paying him, Morris, $6,000. Let us see if that is not equally borne out by the evidence and circumstances.

Milner took a like amount, and he swears that was the way he got his. The certificates for Hall, Powell and Caldwell, to whom appellant also sold stock, were issued and delivered by the company to appellant alike.

"Q. You mean, Mr. Morris, that Hall, Powell, Gilmer, and others had not paid you for the stock when the certificates were issued?

A. Yes, sir.

Q. And those certificates were sent down to you and transferred to you, and were held by you until these parties severally paid the money?

A. Yes, sir. Dep. Josiah Morris, Record, p. 116.

By the testimony of appellee and his father it is shown that neither of them at any time ever agreed to take the stock from appellant, and it is equally clear that appellant paid for it, the only difference in this respect being in the manner of payment, appellee swearing that it was an advance of money, and the proof showing a payment in land. It is manifest that the purchase of the land could not have been made under the Chattanooga agreement for the rea-

sons stated, and that being so, there could have been no agreement for an advance of money, and the transaction is only consistent with the agreement as testified to by appellant, which was an agreement on his part to let the several parties have the stock on their paying him for it. The Gilmers both testiy that neither of them ever gave appellant any acknowledgment or obligation to take or pay for the stock, and yet all the other parties did, who got any stock.

Dep. Morris, p. 128.

Why this difference when all of the parties stood on the same footing?

Why should appellant let appellee have any stock? He was not intimate with him, nor did he at that time have any business relations with him? With F. M. Gilmer it was entirely different, and appellant explains why it was he offered to let F. M. Gilmer have the privilege of taking the stock and carry it for him a reasonable time until he paid for it.

Appellee and his father testify as to the new agreement or pledge in 1875, and appellant denies any such agreement; he denies that he ever made any agreement with appellee at any time. Record, p. 115.

On the former trial this is appellant's testimony on that subject:

"The first time that Mr. J. N. Gilmer spoke to me was just prior. I suppose a month prior to the filing of the bill, he came into my office one day and said, "Mr. Morris, what did you ever do with my Elyton Land stock? And I said, "Jimmie Nick, I did not know you ever had any stock," and he said, "Did you not know that my father gave me the stock?" and I said, "I knew he had none to give you because he had not paid for it." And he said, "I thought father gave me the stock," and I said, "If he ever gave you any stock it was without my knowledge. He certainly never paid for any. I know there were sixty shares originally in your name, but you know, or ought to know, that it was put there by your father's direction, and for his benefit, and that you had no interest in it." And he said, "Well, I do not know Mr. Morris, but I thought I would get enough out of it to pay for my house and lot. I then told him if I owed him anything I would pay it, but that I had sold the stock in 1881." And he then asked, "Why did you have it transferred in 1875," and I told him it was levied upon on an

execution against you, and he said this was a mistake, as there was no execution against him. I can not tell whether the execution was against Gilmer, Browder & Co., or Gilmer & Donaldson, but I told him there was an execution against him and it was levied upon. I was notified from Birmingham that it was levied upon, and I wrote to Birmingham to know whom the execution was in favor of, or who controlled it, and they wrote me back—or I got the information—that Col. Troy was the attorney who brought the suit and had ordered the levy, and I went to Col. Troy and asked him about it, and he said, yes, that he had levied upon it, that he had an execution of $233.00 against Gilmer—or whoever it was—and that he found out that there was some stock standing in his name and that he had levied upon it. I then told him that he was an attorney of mine, when he said that he did not know the stock was mine; I then told him I did not want anything that was wrong, and that as Mr. Gilmer owed me more than this stock was worth, I wanted his opinion as to whether I was legally liable to pay that execution, and that if I was, I would pay it. He said that he was satisfied I was, but that he would look into it a little farther, and he afterwards told me that there was no way of getting out of it, when I paid it and he ordered it dismissed at once.

Q. Did you get a transfer of the judgment?

A. Yes, sir. I then asked him what I ought to do, as there may be other judgments; and he said there were two ways out of it, to sue on it or have it transferred to myself, and I immediately sent up the certificate for the 60 shares and directed them to issue a new certificate to me individually and take up the other certificate, which they did and sent me back another certificate in my own name."

Dep. Josiah Morris, Record, pp. 207, 208.

On the cross-examination appellee drew out the following:

Q. Did you tell Col. Troy, who had that execution levied on that stock in 1875, that you were the owner of that stock then?

A. Told him it was my stock, and they owed me enough to cover it.

Q. You told him that you were the owner of the stock?

A. It belonged to me.

Q. Did you tell him the circumstances?

A. I do not remember that I did. I think it very probable that I did (when I get time I will take it down for you); I do not remember that I did.

Q. Col. Troy then did not advise you that you had a right to that stock, did he then?

A. I must answer that by an explanation.

Q. Can't you answer yes or no first?

A. No, I cannot remember whether I explained it to him, and cannot

remember as to whether he advised me or not. I know he did advise me. When I found out that he was the attorney that obtained the execution, I went to him at once and the first thing that he told me was that the stock was subject to the execution unless it was transferred on the books. I told him that I never knew before but what the stock was mine, as I had the certificate of stock transferred five years ago, but he said that does not make any difference, and I said, look into the matter, and if you say I must pay it I will pay it, but it is my st ck. I meant by that they owed me something.

Q. You did not mean that the stock was yours?

A. I mean that they owed me three times that much. He then afterwards told me that I would have to pay the judgment, and I paid it. I said I cannot let this stock remain in this kind of fix. and he said you have a perfect right to have it in your own name, and I had it done; he advised me to do it.

Q. Did you not know that you had the right to do that in 1871?

A. No, sir. Dep. J. Morris. Record pp. 239, 240.

And these same facts are substantially detailed by appellant in his deposition in this case. Record p. 117.

Col. Troy, the attorney spoken of, is examined as a witness in this case, and this is his account of the transaction.

Q. Will you please state what you may know in regard to the levy of an execution in favor of Farley and others on sixty shares of stock as the property of J. N. Gilmer, in 1875?

A. As attorney for Mrs. Margaret Farley, I obtained a judgment in the Circuit or City Court of Montgomery for a little over $200, against Gilmer, Browder & Co., on which I think there had been an execution returned "no property found." At all events I knew of no property belonging to the defendants in Montgomery County where they resided, out of which the money could be made, and could find none after enquiry. I saw in the list of stockholders of the Elyton Land Company sixty shares of stock standing in the name of J. N. Gilmer, who was the Gilmer of Gilmer, Browder & Co., and I sent an execution to Jefferson county and had it levied on that sixty shares of stock as the property of J. N. Gilmer. Shortly after the levy, Mr. Morris told me the sixty shares belonged to him. I told him that the stock standing in the name of Gilmer on the books of the Company was liable to an execution against Gilmer levied on it without notice of his title or claim, and that I was satisfied Mrs. Farley had no notice and that I had none. He asked me to look into the question, and said he was willing to act on my judgment in the matter, and if, after looking into it, I was satisfied that the stock was liable, he would pay the judgment. I did examine the statute again, and told him that the stock was liable to the execution, and he paid the judgment; and my reeollection is that I transferred the judgment to him without recourse on Mrs. Farley. He then

asked me what was necessary to be done to prevent the stock from being levied on by other creditors of J. N. Gilmer; he said he had agreed with Frank Gilmer that the stock should stand in the name of J. N. Gilmer, and that if Frank Gilmer paid for the stock it was to belong to him. I advised him then that he had better sell the stock and apply the proceeds to what Gilmer owed him, he having stated that F. M. Gilmer owed him still more than the value of the stock. He said no, he did not want to sell the stock, that it would not bring the amount that Gilmer owed him, and that the stock never in fact belonged to Gilmer, it was only to be his if he paid for it. I then told him that if he would have the stock put on the books in his own name, it would prevent any further attacks from J. N. Gilmer's creditors; and he said he would do so. I think that is about the substance of what passed.

Q. Did I understand you to say that in this conversation Mr. Morris claimed the stock as his own?

A. He did the first time he spoke to me on the subject, and he did afterwards when I advised him to sell it; that was the ground upon which he declined to act upon my advice to sell. In the advice that I gave him, I called his attention to the necessity of a sale to cut off any rights that Gilmer might have in the stock.

Dep. D. S. Troy. Record, p. 150.

How are these statements to be reconciled with those made by appellee and his father. They cannot be, and we insist that the burden, being on appellee, he can not with the evidence in this state, be held to have established the pledge of 1875. An examination of the depositions of appellee and F. M. Gilmer will produce the conviction that their versions of this transaction is wholly inaccurate and unreliable to characterize them in the mildest possible terms.

It is proved by appellent, and his evidence is undisputed on this point, and shown by the accounts that F. M. Gilmer owed him in October, 1874, $5,742 individually, in April, 1875, $3,634, and in April, 1876, $5,940.11, and when the account was closed, in July, 1876, $3,734.41, and no liability for this stock is included in these statements. Dep. Morris, Record, pp. 119, 120.

Though the testimony shows that the 60 shares of stock were worth not more than $2,400 in 1875, and steadily declining, and appellee was indebted to Morris & Co., in the

sum of $3,934.03, he gravely asks the court on these facts to find that appellant, on behalf of his firm, agreed to accept as a pledge, these 60 shares, for which appellee admits appellant had never been paid the purchase money.

Another cogent circumstance is the fact that all of the balances against appellee on the books of Morris & Co., were charged off to profit and loss before any demand was made by appellee. for the stock.

In the State Court appellant testified that these balances were scratched off, or marked off. (Record, p. 231), and in this case he says, the balance due by appellee, $3,882.27, was charged to profit and loss, March 5th, 1884. (Record, pp. 129, 135.)

It was insisted in the court below, that appellant was estopped to deny appellee's title to the 60 shares of stock, but we respectfully submit that as between them, there can be no estoppel on either, *to prove the whole truth* as to *the real ownership* of these shares. This is conclusively established in *Duncan v. The Mobile & Ohio R. R. Co.*, 3 Wood's Rep. 578, by the reasoning and conclusion of Judge Bradley, who delivered the opinion in that case, and who there pointed out *the genuine test* for determining such questions between such parties. His significant language is thus:

"Was the transaction, as it *actually occurred*, *a purchase* of the coupons? It is insisted by the claimant that his *possession* of the coupons uncancelled is *prima facie* evidence of his title to them, with all the rights of a purchaser. "So it would be *if the evidence did not disclose the exact nature of the possession.*" Whilst he has possession, *we know how he got that possession*," &c. "Then was it a purchase? We are clearly of opinion that *there was no purchase, unless there was an intent on the part of the original holder to sell.* This is almost a self-evident proposition."

It was contended for appellee, and the court below found that the stock was pledged for the debts of the firms with which appellee was connected after March 30th, 1875. We will review the testimony in relation to them.

The account of Gilmer & Donaldson opened with a deposit of $600.00, March 26th, 1875, and at the time the contract testified to by appellee as to the transfer of the stock on

March 30th, 1875, was made, instead of said firm being indebted to Morris & Co., it had with them a considerable sum to its credit, and he swears he never mentioned the matter to appellee after that date.

Record, p. 248.

The account of J. N. Gilmer & Co. was opened by a deposit, September 27th, 1876.

Record, p. 268.

The last item charged on that account was March 20th, 1879. May 30th, 1879, there was a small deposit and a balance struck, showing that firm indebted to Morris & Co. $222.43. This balance was afterward settled by the payment of money and the execution of a note, and the latter paid in the fall of 1883.

Record, p. 268.

This of the account, the evidence shows that appellee was repeatedly dunned about, during which dunnings all the witnesses testify he never once claimed that appellant had any collaterals to secure the debt. A most remarkable omission, if appellee believed at the time he had any such collaterals in appellant's hand, an omission which emphatically negatives any such belief on his part.

The accounts of Gilmer & Clanton and Gilmer and Merritt, followed those of Gilmer & Co.; the evidence does not show when either of them was opened or closed, nothing it appears is, or has been due on them.

As we have heretofore shown, appellant in this case, and in the case in the State court, distinctly swears that not a word ever passed between appellant and himself with reference to the stock from the 30th of March, 1875, until just before he commenced his suit in the State court in 1884. The transaction of 1875 between them is given in substantially the same language in his testimony in each case.

The Supreme Court of Alabama on the former trial said there was no evidence showing that any of these accounts were based upon this stock as a collateral, and we respect

fully insist that in this case there is the same absence of any such proof that there was in the evidence before the State Court. We have shown what appellee said about the contract of March 30th, 1875. Now we will review the testimony of F. M. Gilmer, on that, and subsequent transactions.

In answer to the question if he made any arrangements for a credit for the firm of Gilmer & Donaldson, he says—

"I had frequent interviews with Mr. Morris in relation to their business "and credits, and he arranged with me to make such advances as they "might need in their business, secured by this stock of J. N. Gilmer and "other securities, which Mr. Donaldson placed in Mr. Morris' "hands."

And again:

"I had varions interviews with Mr. Morris in arranging credits for Gilmer & Donaldson, and included as a basis in all these negotiations this stock of J. N. Gilmer, as a basis of credit."

Dep. of F. M. Gilmer, Record p. 75.

This is all, no dates are given; we are not told what passed between the parties, what conversation occurred, but are required to rely simply on the witness' recollection of the conclusion drawn by him from those interviews; the impression they left on his mind. This witness testifies that when he heard that the stock had been levied upon in 1875, he asked appellant to advance the money to pay it and hold the stock as collateral, and appellant told him to send the appellee to him and he would make the arrangement with him. He does not pretend that any arrangement was made with him, the witness. Record p. 74.

In speaking of the credits extended to the other firms, of which appellee was a member, he does not pretend that appellant ever agreed to look to the stock as security. He testifies that he continued the business relations with Morris & Co., based upon such security. Though pressed hard by counsel for appellee to testify to some conversation after 1875, in which appellant recognized the stock as security for any such debts, he fails to do so. He has much to say about what he regarded, but of course it is not necessary to argue that that is no evidence. He expressly swears in answer to the direct question of his son's counsel as to whether appellant had acknowledged that the stock was appellee's,

and if so when, that the last definite acknowledgment was when he agreed to pay this judgment of $237.00 or $235. Record p 81.

Again, on the next page, the counsel, anxious to get an answer from him that would put this question at rest so far as that witness was concerned, put at him this leading question:

"You say you have had conversations with him since 1875 in reference to it?"

To this question, even pressed as he was for a favorable answer, and anxious as he no doubt was to give it, seeing as he evidently did, that the counsel thought it an important point, he answers—

"I do not recollect any distinct conversation, but we have had very many talks on business matters, and he has always regarded that as Jimmie's"—his son's—"stock."

This last part was objected to, and as it is illegal evidence cannot be considered.

Again, on page 82, appellee's counsel, anxious to get some evidence of some acknowledgment by appellant after 1875, with a persistency that shows how far short the evidence was of what he considered necessary to show any subsequent dealings between the parties in which the stock was treated as a security, put the question pointedly at the witness:

"Do you mean to say, then, that the last acknowledgment he made that the property was a security in his hands for the debts of J. N. Gilmer, was in 1875, or do you recollect that you had a conversation after that?

To this the witness replied—

"That is the last definite conversation I can recollect of his saying that."

Then counsel gave up all hope of getting any legal evidence on this point and commenced to ask the witness against appellant's objection as to how the stock was treated after 1875. This evidence is clearly illegal and we do not propose to reflect upon the intelligence of the court by wasting time in an argument to show that it is. This witness swears that he found out in 1883, that the stock was paying dividends, the very year, in the latter part of which, that lit-

tle note for$52.33 given for the balance due by Gilmer & Co., was paid, without mentioning the fact that the maker of the note owned this valuable stock which was only pledged for a few hundred dollars, if appellee's theory be true. This witness also testifies that he thought the stock was worth par all the time after 1875.

Now, the burden of showing a recognition of this trust by appellant, after 1875 is upon appellee, who asserts such subsequent recognition.

Let the court take F. M. Gilmer's testimony, and upon that reach a conclusion, that at any time after March 30th, 1875, appellant ever in any manner recognized appellee's right to the stock. It cannot be done. If it can, on what day, during what month, age—during what year thereafter can it be said from that evidence, that there was any such recognition ?

Where the burden of proving a certain state of facts is cast upon a party, he must introduce sufficient evidence to satisfy the court of its existence ; it must be such as to convince the judgment of the court by applying the ordinary tests for the assertainment of truth, that such facts exist.

1 Brickell's Digest, pp. 871–2, §§ 964–5.

We respectfully insist that the court cannot find from even the evidence of appellee and his father, that at any time after March 30th, 1875, appellant ever even recognized that he held the stock in trust for appellee. This, we say, appellee's testimony fails to prove, and when we consider that appellant in his testimony emphatically denies that anything was ever said to him about the stock being a security for any of the debts due his firm by any of the firms of which appellee was a member, taken in connection with the testimony of Col. Troy, as to what occurred when the execution was levied on the stock in 1875, and that of a number of witnesses, showing that during all of that time and up to 1881, the stock was so depreciated that it was almost worthless. The decided weight of the testimony is against the theory that there ever was

any credit extended to any of such firms, on that stock as a basis.

But, even if the court should believe appellee, that credit was extended to the firm of Gilmer & Donaldson on the stock, it would not help appellee, for even then his right would be effectually barred. If six, or even ten years bars his right, and we will show that either will, then, though appellant might have been willing during every day of either period to take his money and transfer the stock, that would not deprive him of the right to avail himself of the lapse of such period as a bar to the right of redemption. Nothing short of an acceptance of a part of the debt so secured or on acknowledgment in writing, would so bar him.

Code of 1886, § 2628, and authorities cited.

It was said by counsel for appellee in one of their arguments, that the application by appellant of the proceeds of the insurance stock deposited with him by Donaldson as a security for the debt due by Gilmer & Donaldson, stopped the running of the statute. This proposition is utterly untenable. The firm of Gilmer & Donaldson was dissolved in 1876. If Donaldson had been living and had made a payment in 1880, it would not in any manner have affected the statute of limitations between appellee and appellant: the debt would have been barred as against appellee in 1882, notwithstanding such payment.

Bell v. Morrison, 1 Peters, 351.
Van Keuren v. Parmelee, 2 Com. 523.
Myatts v. Bell, 41 Ala. 222.

And the sale of the collateral and application of the proceeds as a credit on the debt, even had it been appellee's collateral instead of Donaldson's, would not have stopped the running of the statute as between these parties. *a fortiori*, the application of the proceeds of Donaldson's collateral can not stop the running of the statute as between them.

This principle is well settled.

Lyon v. The State Bank, 12 Ala. 508.
Royston v. May, 71 Ala. 398, 401.
Brown v. Latham, 42 Am. R., 586.

Does the statute of limitations apply to a pledge like the one shown here? As said by the Supreme Court of this State, this evidence shows a contract more in the nature of a mortgage than what is usually considered as a pledge. Here was on its face an absolute transfer of the title and possession of the property. Appellee contends that though that is the case, yet there was a verbal agreement between appellant and himself, that the property was to be re transferred to him on the payment of certain debts. There can be no difference in principle or in the rules of law governing the rights and remedies of the parties to this transaction between this case and a similar transfer of any other property. Suppose, instead of stock, plaintiff had made an absolute bill of sale, transferring to defendant so many horses, or an absolute deed conveying him so much land, and had put him in possession of the property so transferred or conveyed, but with a parol agreement that it was to be held merely as a security for a debt and was to be re-transferred or re conveyed on the payment of the debt, would the debtor's rights and remedies be less or different in that case from what they would be in the case of stock? We can see no sense or reason in contending that they would be; on the contrary, in the case of a thing subject to the fluctuations that stock is in this country, we can see many reasons why the debtor should be held to greater diligence. There is and can be no difference between the two classes of cases, or in the rights and remedies. It has been decided in this State from its earliest days that where property was thus transferred, or conveyed, its possession, if personal property, for six years by the transferee, if real estate, for ten years by the grantee, would defeat any bill for redemption, or action for its recovery. The decisions on that question commence with the early history of Alabama, as we have said, and come down in a unbroken line to the present day. A transfer of possession and legal title, though intended and agreed upon as merely a security for a debt, vests in the person to

whom the transfer is made an absolute title, if personal property, after six years, if realty, after ten years, and cuts off all the rights of the debtor. It is expressly held, that the statute of limitations operating upon a possession, so as to vest title, is applicable to possession held under such contracts.

Humphries v. Terrell, 1 Ala. 650.
Byrd v. McDaniel, 33 Ib., 18.
McCoy v. Gentry, 73 Ib., 105, 110.
Gilmer v. Morris, 80 Ib. 78.

This view of the case, taken by our Supreme Court, that the contract in this case was in the nature of a mortgage, is supported by the decisions of this Court.

In Casey v. Cavaroc, 96 U. S., on page 477, this court, in speaking of a similar contract, where the legal title and possession were both transferred, say:

"In such a case there is a union of two distinct forms of security—that of a mortgage and that of a pledge; a mortgage by virtue of the title and a pledge by virtue of the possession."—Jones on Chat. Mort., § 4.

The counsel for appellee undertook to draw a distinction between the possession of one holding under such a contract as this, and one holding as an ordinary mortgagee. It was argued that, as under an ordinary mortgage, the mortgagee did not have the right to possession until there was default in payment of the debt, it was for that reason that his possession, taken after that, was adverse. We can see no reason for any such distinction. The premise itself is false, so of course an argument based upon it must fall. The law is, that the mortgagee is entitled to immediate possession of the property before default, unless the mortgage expressly provides that the mortgagor shall retain possession until such time; and at common law, in the case of personal property the mortgage was worthless unless the mortgagee took possession.

Jones on Chattel Mortgages, § 176.
Woodward v. Parsons, 59 Ala. 625.
Coffey v. Hunt, 75 *Ib.* 236.
Coyle v. Wilkins, 57 *Ib.* 108.

We have shown conclusively, by the authorities cited, that in Alabama, it has been the settled law for many years, that where a person holds property, as in this case, as a security for debt, having both the legal title and the possession, the statute of limitations commences running in his favor on the day the debt matures; and if no time is fixed for the payment of the debt, on the day the contract is made; and if it is personal property, then six years of such possession vests in him the absolute unqualified title. It makes no difference, as said in this case by the Chancellor and the Supreme Court, and as was also said in *Humphries v Terrell*, that the creditor might have been ready and willing to re-transfer the property on the payment of the debt; such readiness and willingness does not and cannot affect the running of the statute. What might have been decided in another age, as to the lapse of time necessary to bar actions of this kind, can have no weight now. Where transactions of the kind a half century ago amounted to only thousands, they now run into billions. Such stocks are constantly fluctuating in value; the evidence in this case showing overwhelmingly, that from 1873 until after the Gilmer & Donaldson debt was barred, for the greater part of the time, the value of this particular stock was greatly less than the aggregate amount of the debts due by plaintiff individually and by Gilmer & Donaldson.

Under such circumstances courts may well say, as was said by Lowrie, C. J., in Waterman v. Brown, 31 Penn. St. 161:

"We should administer equity very badly if we should allow the plaintiff to treat the stock as defendant's for so long a period, and the debt as "paid by it, and then to claim the benefit of a rise in value, occasioned by "no merit of his."

The whole tendency of the decisions and of legislation, for years has been, to shorten the time in which parties claiming rights are permitted to assert them. This is a busy age, trade and commerce in all commodities has increased to an extent not dreamed of by the wildest visionary, fifty

years ago. The protection and fostering of this trade, the preservation of rights acquired through its channels, and the security of titles, demand that persons claiming adverse titles to the subjects of this trade, should assert them in a reasonable time. Neither the law or equity owes any favors to those who are not diligent.

James v. James, 55 Ala. 525.
Cotton v. Cotton, 75 *Ib.* 345.
Gordon v. Ross, 63 *Ib.* 363, 367.
Snedecor v. Watkins, 71 *Ib.* 48.
Gentry v. Rogers, 40 *Ib.* 442.
Stucky v. Bellah, 41 *Ib.* 700.
9 Sawyer, 354, 21 Wallace, 178.

In every instance in which the question has been presented to our court it has been held that the statute of limitations ran against the debtor under such a contract. If any line of decisions could have become a rule of property, this surely has. It has been repeatedly held that a line of decisions, continuing for a much shorter time than these have, had become rules of property.

Livingston v. Arrington, 28 Ala. 424.
Bennett v. Bennett, 34 *Ib.* 53.
Nolen v. Palmer, 24 *Ib.* 391.
Rawls v. Kennedy, 23 *Ib.* 240, 251.
Strickland v. Nance, 19 *Ib.* 233, 236.
27 Am. Decisions, n. on pp. 631-5.

In all such cases the courts of the United States sitting in a State are bound by the decisions of the State Supreme Court, and the reason is stronger where the State court has settled the question in the very case before the United States Court.

Christy v. Pidgeon, 4 Wall. 196.
Harpending v. Dutch Church, 16 Peters, 485.
Beauregard v. City of New Orleans, 18 How. 497.
Fisher v. Haldemen, 20 *Ib.* 186.
Snydam *v.* Williamson, 24 *Ib.* 427.
McClung v. Silliman, 3 Peters, 270.
Green v. Neal, 6 *Ib.* 291.

And to such a length do the Supreme Court of the United

States carry this doctrine, that where a State court has reversed its former ruling on the question as to whether the statute of limitations does or does not bar a right or claim, that court will reverse its ruling so as to make it conform to the latest decision of the State Court.

Leffingwell v. Warren, 2 Black. 599.
Moores v. National Bank, 104 U. S. 625.
Bucher v. Cheshire R. R. Co. 125 U. S. 555.

In this last case all the authorities are reviewed.

There is absolutely no foundation for the position assumed by the counsel for appellee that the decisions on this question by the State Court are conflicting. There is not a single case to be found in which the principle is decided differently from what it was in this case, when before the Supreme Court.

Moses v. St. Paul, 67 Ala. 168, was referred to as deciding differently: It does not, and there is not even a dictum in it to the contrary. The question of the application of the two years limitation created by the bankrupt law was the only question before the court in that case, and it was held that the statute was applicable. It is difficult to see how such a decision can be said to conflict with those cited by us. In the opinion, the court refer to the argument of counsel therein, that statutes of limitation are not applicable to such pledges as the one before it, which was a pledge, pure and simple, the legal title being retained by the pledgor, and say, that even if that is true generally, it had no application to the case before them. This is the only case in which there is the least pretense that the Supreme Court of Alabama has held otherwise than as in the case at bar.

We insist that in no aspect of this case can the present bill be maintained, for two reasons.

First, It is shown that the stock was sold in 1881, and appellee knew of it more than two years before this bill was filed.

Second, On the contract as proved, no bill to redeem will lie.

In *Hayward v. National Bank*, 96 U. S. the bill was filed to redeem stock which had been sold under the pledge by the bank with which it was pledged, and purchased by it at its own sale; this court held that the bill could not be maintained. It is there said, p. 614.

> A large portion of the very elaborate argument made in behalf of the appellant was in support of the proposition that the bank, having received the stock in pledge to secure his indebtedness to it, could not, consistently with settled principles, buy from itself, and consequently could not sell to its directors. If these principles were at all applicable to this case, it would only follow that the bank, by violating its duty, had become liable to him for the value of the stock, but such liability is not charged, nor is such relief asked. The specific relief sought is a decree requiring the bank to transfer the stock to him—a thing now beyond its power to do. It is true that the bill contains a general prayer for such relief as may be consistent with equity and good conscience; but we incline to the opinion that its whole frame and structure are inconsistent with a right in this suit to a decree for the value of the stock, even if the facts justified any such relief. I Dan. Ch. Pr. (3d Am. ed.)382; Chalmers et ux v. Chambers, 16 Har. & J. (Md.) 29; Hobson v. McArthur, 16 Pet. 182; English v. Foxall; 2 id. 595; Thomason v. Smithson, 7 Port. (Ala.) 144; Driver v. Fortner, 5 id. 9; Strange v. Watson, 11 Ala. 324.

See also Reese v. Kirk, 29 Ala. 406; Florence S. M. Co. v. Zeigler, 58 Ala. 221.

But it is contended that there never was any sale of the stock; that on the facts as proved no sale is shown. Let us examine the proofs.

In paragraph 4 of the original bill, in the State Court, appellee denied that appellant ever made any sale of the stock. In paragraph 5 of this bill he alleged that appellant claimed in May, 1884, that he had sold the stock to Baldwin, and others. (Record, pp. 161, 162.) In paragraph 4 of his amended bill, he denies that appellant made any actual or legal sale of the stock. In his amended answer, (Record, p. 167) appellant alleges, that he did sell the shares.

Appellant testified that he sold the stock; that he sent the certificate with others amounting in all to 410 shares, to the Company, with directions to issue certificates for 100 shares

each to the two Woodwards and Baldwin. Appellant said his object "in transferring this stock, was that the 60 shares should be a portion of the sale, and it was sent there to get into one, whatever the balance might be. Record, p. 238. See, also, Dep. Josiah Morris in State Court, Record, pp. 208, 236, 237; Dep. in this cause, Record, p. 117, 118.

Counsel for appellee contended that as the surplus over the 300 shares transferred, viz: 110 shares, was large enough to comprehend the 60 shares, it could not be told whether the 60 shares were sold or not. This contention involves the proposition that though a party may desire and intend to sell a particular 60 shares of stock, and surrenders the certificate therefor, for that purpose and object, if he owns other stock which he surrenders at the same time for that purpose, and the number of shares returned to him, after the 60 are disposed of, exceeds the 60 he has attempted to sell, his object and intent fails, because it cannot be told by any tangible mark whether the 60 shares were part of the stock returned or not.

The fallacy of the position, as we think, lies in the fact that counsel endeavor to apply to these choses in action a rule which can have no application. Whenever appellant surrendered the certificate for 60 shares to the Company with the intention of selling those particular shares, and the certificate for them was cancelled by the Company, we submit there was as effectual a sale of these 60 shares as if the certificate had been endorsed to the Woodwards and Baldwin. If a man has two bins of grain in possession of a bailee, one containing 100 bushels and the other 500 bushels, and for this grain he holds two receipts, one for 100, and the other for 500, and he undertakes to sell the 100 bushels, and with that object he surrenders to his bailee the two receipts, and thereupon the bailee empties the 100 bushels into the bin with the 500, and delivers to the purchaser from the joint mass 100 bushels and returns the seller a new receipt for 500 bushels, could there be any doubt but that the 100 bushels had been sold. Can any distinction be drawn between this

supposed case and the one at bar? Appellant intends to sell, tries to sell, but because the certificate was surrendered with others, amounting in all to more than the number sold, there was no sale.

As we have said the Supreme Court of Alabama found as a fact the sale in 1881. Op. Somerville, J., Record, p. 27.

In the briefs filed by counsel in the State Court they then said: "It is wholly immaterial to us, however, whether a sale of the stock was made or not." (Record, top of page 324.) And they then relied on the sale to sustain the equity of their bill and to obviate the necessity for a tender of the amount due. Record, p. 324. Head XIII of brief of counsel.

If the court should agree with us that the agreements proved amount only to a conditional sale, or to an agreement for a sale on the performance of a condition, it is clear that the bill as now framed would not lie.

Davison v. Davis, 125 U. S. 90.

Respectfully submitted,

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ALEXANDER T. LONDON,
Attorneys for Appellant.

SAMUEL F. RICE,
DANIEL S. TROY,
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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 1150.

JOSIAH MORRIS, Appellant,

vs.

JAMES N. GILMER, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

ARGUMENT FOR APPELLEE, BY W. A. GUNTER.

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Argument for Appellee, by W. A. GUNTER.

STATEMENT OF THE CASE.

This is the case of a bill to redeem a pledge of stock.

In 1870, the appellee, being the owner by subscription of 120 shares of the capital stock of the Elyton Land Co., a corporation just organized, arranged with appellant to pay the subscription, and to hold the stock as collateral. In 1871, half the stock was sold for the original cost of the whole, $6,000, and the remaining 60 shares were continued in pledge for the small balance of $400 or $500 still due on the purchase, on account of interest.

In 1884, the appellee filed his bill in the State court to redeem this stock, stating therein only the original pledge of 1871, and without any allegation of "any recognition on the defendant Morris' part, of any existing trust relationship between the time of the original transaction and the filing of the bill."—Tr. 27. This bill was met by an answer containing five grounds of demurrer, which were as follows:

"1. The facts alleged show that demand is stale.

2. That it is barred by the statute of limitations.

3. The complainant has an adequate remedy at law.

4 The bill as amended makes an entirely different case from that made by the original bill.

5. There is no tender alleged in the bill of the amount admitted to be due; and said amount is not brought into court." Tr. 22.

The case was submitted on the pleadings and evidence, in term time, and held up for decision in vacation, and was decided in vacation. The decree was one of general dismissal, without qualification, but was founded, we say, upon the demurrer of the statute of limitations.—Tr. 26.

This decree was affirmed, on appeal, in the Supreme Court of Alabama.—Tr. 26.

Thereupon the appellee instituted this suit.

In the bill in this case, the appellee alleges, that, in 1875, and 1876, and afterwards, as his successive firms were formed, until about 1884, this same stock was re-pledged to appellant for other and distinct named debts, and for such future credits as might be extended, and which were given, by appellant's banking house, to appellee and his several firms doing a banking business with them, until 1884. And that the appellant continuously acknowledged the trust relation, he sustained to appellee and said stock, until 1884.—Tr. 2, 3, 4, 5.

This bill was met by a plea in bar, alleging the *res adjudicata* of the former suit.—Tr. 11.

This plea was overruled.—Tr. 44. And the truth of the facts alleged in the bill, being established on final hearing, judgment passed for the appellee.—Tr. 374, 380, 388.

STATEMENT OF FACTS.

Appellee was an original subscriber for 120 shares of the capital stock of the Elyton Land Co., to cost $6,000.—Tr. 88, 198-9, 222.

The appellant agreed to pay for this stock, and carry it for an indefinite time, until it could be paid for.—Tr. 74, 214, 217, 218, 220, 221, 222, 223, 225, 227, 229, 239.

The stock was issued in appellee's name, and transferred to

appellant under this agreement, to secure the cost, and was an individual transaction with Morris.—Tr. 5-6, 126, 129, 194, 222, 225.

Soon afterwards, one Linn bought one-half of the stock for $6,000, which was received by appellant, and the remainder was in 1871 pledged for the balance due on the purchase to appellant, but the stock was not transferred on the books of company until 1875.—Tr. 74, 89, 97, 98, 116-7, 125, 127, 223, 239.

In March, 1875, the stock was levied on by the sheriff as appellee's property, to pay a debt for $230.00 to one Farley.—Tr. 74, 90, 117.

The appellant agreed to pay this debt and to hold the stock as security therefor. He did pay it, and charged it on the 12th July, 1875, against appellee in his firm account of Gilmer and Donaldson.—Tr. 233, 248, 74-5, 90-1, 124, 125, 135.

Appellant agreed in 1875, and afterwards, to make advances to appellee's several firms as they came into existence, and to hold this stock as collateral against the same. And he held other securities.—Tr. 75, 79, 80, 92-3, 224, 225, 240.

These firms did a continuous business with appellant, and received advances, from time to time, until the summer of 1884. The last two firms, Gilmer & Clanton, and Gilmer & Merritt left no balances against them.—Tr. 92-3-4, 111.

The first firm was Gilmer, Browder & Co. The account of this firm was charged in November, 1876, to the next firm, Gilmer & Donaldson.—Tr. 258 and 265.

The firm of Gilmer & Donaldson was dissolved by death of Donaldson in 1876—they left a balance due, payments on which were made up to March 11, 1880.—Tr. 133, 233, 244, 258.

The succeeding firm, J. N. Gilmer & Co., also left a small balance, which was paid on 3d October, 1883.—Tr. 93-4, 132, 244, 279.

Gilmer & Clanton, and Gilmer & Merritt, who came successively after Gilmer & Co., did business to 1884, but left no balances.—Tr. 93-4.

Appellant never notified any one to redeem this stock—never notified any one that he intended to sell it, or that he had sold it.—Tr. 241, 242, 89, 93-4, 96-7, 132.

The appellant testifies that he sold this stock in 1881.—Tr. 117, 223.

But, on cross-examination, shows that he never did sell it. He had, in 1881, bought one Powell's stock of 426 shares at par, but before buying, had arranged to sell 300 shares to certain parties in New York.—Tr. 235-6. Not having received all of the Powell stock in hand at once (Tr. 236), though bought, he sent up to the secretary of the Company a larger lot of stock (410 shares,) than was to be given to the New York parties (Tr. 118), and directed the officer to issue a certain number of shares to each of the New York parties, and to send a certificate for the balance (110 shares) to him.—Tr. 132. This was done. Among the stock so forwarded to the secretary at Birmingham, was the stock in question (Tr. 118, 132); but, whether it was issued to the New York parties, or returned to appellant, he was unable to say. No contract was made with any one for the sale of these particular shares.—Tr. 132, 236-7-8.

No report of any sale was ever made to any one—and no credit was entered upon any account, at any time, for a sale of said stock—Tr. 231, 232, 241-2-3.

The stock commenced paying dividends in 1882 (Tr. 241), and up to Aug. 1st had paid $4,200; and by Aug. 1st, 1884, had paid, from dividends alone, every debt of appellee and his firms, to appellant and his firms, and left a balance of $225.75 in appellee's favor.—See Schedule A, Tr. 383.

ARGUMENT.

JURISDICTION FEATURE.

I. It is insisted, by the appellant, that the lower court should have dismissed this case for the want of jurisdiction, and there is an assignment of error, to that effect, in the argument of counsel.

So far as this matter is concerned, there is nothing in the record on which to predicate any assignment of error. The averment of citizenship to give jurisdiction in the bill is full. Tr. 1.

The appellant did not plead or allege any matter in abatement, but filed a plea in bar of the relief prayed.—Tr. 11.

This plea came on regularly to be heard upon its sufficiency in law, and was overruled.—Tr. 44.

The appellant then filed his answer, setting up other matters in bar of relief.—Tr. 44 to 66.

To which the appellee filed his replication; and thereupon, the proofs were taken.—Tr. 66, 87, 88, 111, 112, 136, etc.

The cause came on to be heard again, and was tried at the November term, 1887, the trial taking place on 16th January, 1888.—Tr. 72.

On the 17th day of Dec. 1887, after the taking of proofs, the appellant filed a suggestion and motion, set out on page 70 of the transcript, stating:

"That it appears from the depositions of the complainant, J. N. Gilmer, and F. M. Gilmer, a witness examined on his behalf in this cause, and from the affidavit of defendant, Josiah Morris, and A. Gerald, filed by defendants on the 16th day of December, 1887, that the said complainant is not, and was not at the commencement of this suit, a citizen of the State of Tennessee, but was in in fact a citizen of the State of Alabama, and that the said complainant in this suit was improperly made a plaintiff in this suit for the purpose of creating a case cognizable under the statute laws of the United States, and that this suit does not really and substantially involve a suit or controversy properly within the jurisdiction of this court; wherefore said defendants move the court to proceed no further herein, but to dismiss this suit out of this court"

The court overruled this motion, after consideration and argument.—Tr. 70–1.

The first question on this is: whether the appellant can assign error on the refusal of the court to grant the motion, "to proceed no further herein, but to dismiss this suit out of this court."

This court is, as to this case and these parties, wholly an ap-

pellate tribunal, and "error must be shown affirmatively; it can not be presumed."

The motion in this instance is founded on the fifth section of the act of March 3rd, 1875, construed in a number of cases in this court.

Before the passage of that law, it was well settled "that the citizenship of the parties could not be put in issue on the merits, but that it must be brought forward at an earlier stage in the proceedings by plea in abatement, in the nature of a plea to the jurisdiction."—Farmington v. Pillsbury, 114 U. S. 143.

"Such was the condition of the law when the act of 1875 was passed;" but by that law "the old rule established by the decisions, which required all objections to the citizenship of the parties, unless shown on the face of the record, to be taken by plea in abatement, before pleading to the merits, was changed, and the courts were given full authority to protect themselves against the false pretences of apparent parties."

Farmington v. Pillsbury, 114 U. S., 143–4.

The terms of that act are:

"If in any such suit * * * it shall appear to the satisfaction of the circuit court, *at any time after such suit has been brought* * * that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said circuit court * * the said circuit court shall proceed no further therein, but shall dismiss the suit * * , but the order dismissing * said cause shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

U. S. Statutes 1874–5, p. 472, § 5.

In Williams v. Nottawa, 104 U. S., 212, in speaking of cases under this law it is said:

"Whether, if a defendant allows a case to go on until judgment has been rendered against him, he can take advantage of the objection on appeal, or writ of error, we need not decide. That would be a different case from this."

In Hartogg v. Memory, 116 U. S. 590, construing this statute,

and reviewing all the prior decisions, the following propositions may be said to be definitely settled.

1. That the general rule, well settled before the act of 1875, that when the citizenship necessary to give jurisdiction appeared on the face of the record, evidence to contradict the record was not admissible, except under a plea in abatement, and that a plea to the merits was an admission of the citizenship and wavier of a plea to the jurisdiction—was not altered by the act of 1875.

2. That the act of 1875 was enacted to enable the court, of its own motion, at any stage of the cause, to investigate the question of jurisdiction; and upon doing so, to protect itself from fraud, by a proper judgment.

3. That neither party under that act, has the right, *without pleading at the proper time, and in the proper way*, to introduce evidence, the only purpose of which is to make out a case for dismissal; and that they cannot call on the court to go behind the averments of citizenship in the record, except by plea to the jurisdiction.

4. That the case is not to be tried by the parties as if there was a plea to the jurisdiction, when no such plea has been filed; and that the evidence must be directed to the issues, and that it is only when facts *material to the issues* show there is no jurisdiction, that the court can dismiss the case.

This authority disposes of the question at issue. The appellant did not plead to the jurisdiction; he pleaded in bar, and, after judgment against him on that, he filed his answer setting up other issues to the merits, on which the testimony was taken.

When the case came on for trial on these issues, to which, of course, the evidence could only be directed, the appellant, putting, as we affirm, an unwarranted construction on some immaterial, illegal, and irrelevant evidence, asked the court to adopt his views, and, without more, to dismiss the cause in which he had already been defeated on the only debatable matter on the merits.

To entertain such a motion, in the terms in which it was couched, and under the circumstances under which it was made, would, it seems, be beyond the proprieties of legal proceedings. And it is unqualifiedly condemned in 116 U. S. *supra.*

The jurisdiction of the court appears ample by the record. The appellant, by pleading in bar, confessed the jurisdiction, and asked the court to render judgment on the merits; and being defeated, tenders other issues, and, seeing that he must be defeated on them also, concludes to file a plea in abatement, as it were, and in that way to avoid the effect of the judgment already passed, and the final decree impending. This is ample, under general principles, as well as under the direct authority of the case in 116 U. S. *supra*, to show that the appellant has no right to assign error on the ruling of the court on his motion and suggestion.

In this court we are out of the region of fogs, and justice is administered by fixed and well known principles of procedure. And it seems that nothing ought to be better known than, that the issues of the pleadings limit and prescribe the evidence which the parties must produce to support or defend their causes, and the judgment which the court can pronounce.

"It is an invariable and universal rule of the court of chancery, to found its decrees on some matter put in issue between the parties by the bill and answer." No witness can be examined as to matters not in issue.

Bailey v. Ryder, 10 N. Y. (6 Sel.), 369;

Duckworth v. Duckworth, 35 Ala. 74;

Piatt v. Vattier, 9 Pet. 413;

1 Green. Ev., § 528.

If this is so, what warrant is there for the statement of counsel, on page 52 of their argument, that "The *onus* of establishing citizenship in Tennessee, when it was questioned in taking his deposition, was upon appellee?"

Do we take evidence to develope issues to be tried, or do the issues define the evidence to be adduced?

No court can look at, or properly be conscious of, evidence in

a cause beyond and outside of the issues, except for purposes other than those of rendering judgment. It would be an intolerable evil if either party should, after the preparation of the cause upon the only points of dispute, in pleadings framed for that purpose, and after a trial on such issues, have the right to require the court to render any judgment upon irrelevant evidence, improperly introduced. For, until issues have been made, and an opportunity has been given to meet the questions, it is impossible for the court to know what answer may be made. Hence, the rule is that, "The proofs must be according to the allegations of the parties; and if the proofs go to matters not within the allegations, the court can not judicially act upon these as a ground for its decision, for the pleadings do not put them in contestation. The *allegata* and the *probata* must reciprocally meet and conform to each other."

Harrison v. Nixon, 9 Pet. 503.

The long and labored argument of counsel then, on the subject of the law of domicil, is unnecessary to be considered by the appellee, since that question is not within the issues of this appeal.

We do not deny, that it was in the power of the circuit court, if it suspected that its jurisdiction had been imposed upon, to have caused the proper inquiry to be made, or issue to be framed for that purpose, as indicated in 116 U. S. *supra*.

But, this was a matter entirely for the court. The defendant had precluded himself from making the point as a matter of right, by admitting and confessing the jurisdiction, and inviting the action of the court upon his plea in bar of relief. He cannot complain that the court was satisfied with what he admitted to be true, and never disputed, until after the legal sufficiency of his plea in bar had been determined against him.

There is nothing in such case that he can complain of or review.—Hartogg v. Memory, 166 U. S., 590–1.

It will be observed, too, that the statute only makes a *dismissal* reviewable by this court.

There clearly is no right to review the action of the circuit

court in refusing to investigate matters which the party, most interested in denying, has admitted and confessed to be true as stated of record. Nor was there ever any request made for an investigation. The motion was absolute to dismiss, on irrelevant and illegal evidence, which was, moreover, inconclusive to establish the contention of the appellant.

The affidavits filed were *ex parte*, and illegal in form as evidence to prove a contested fact, and, yet, they might be true without impugning the verity of the allegation of citizenship in the bill; and we insist that the same is true of the depositions referred to by the appellant, as sustaining his motion and suggestion. They go to show that the citizenship was *bona fide* as alleged in the bill.

We insist that the law still is, as heretofore declared, that a citizen of the United States can instantly transfer his citizenship from one State to another by commensurate acts and purposes. And the right to sue in the courts of the United States attaches and adheres as an incident to the citizenship.

Rice v. Houston, 13 Wall, p. 68.

And it makes not the slightest difference that the purpose of the change of domicil was "to seek the independent judgment of a Federal court."

Briggs v. French, 2 Sumner, 251.

Manhattan Ins. Co. v, Broughton, 109 U. S., 125–6.

Jones v. Leagne, 18 How., 76.

Catlett v. Galbraith, 3 Wash. C. C. 546.

Castor v. Mitchell, 4 *Ib.* 191.

Case v. Clark, 5 Mason, 70.

Rice v. Houston, 13 Wall. 66.

Gardner v. Sharp, 4 Wash. C. C. 101.

Read v. Bertrand, *Ib.* 514.

Shelton v. Tiffin, 6 How. 163.

Desty Fed. Pro. § 629*a* p, 151; *Ib.* p. 146.

The motive of a party in changing his domicil is not inquirable into. If the removal is real and is only for a day, the citizenship is acquired necessary for bringing suit. The motive can only be looked at as an element of evidence, to deter-

mine the reality of the removal. And if the removal is real, the motive of it is wholly immaterial. It is a well known fact that State courts are sometimes so blinded by delusions and personal or local prejudices and influences, as to render the attainment of justice in them impossible; and the purpose of avoiding an appeal to any tribunal suspected of such influences is natural and honorable. The butchery of justice is the most flagitious of civil wrongs, and its avoidance is the common instinct of self preservation.

Briggs v. French, 2 Sumner, C. C. 255-6, and authorities, *supra.*

"Where a person lives, is taken *prima facie* to be his domicil, until the facts establish the contrary."

Ennis v. Smith, 14 How. 423.

A party who resides in a State with his family, and carries on business there is deemed a citizen of that State.

Knox v. Greenleaf, 4 Dall. 360.
Bryne v. Holt, 2 Wash. C. C. 282.
Shelton v. Tiffin, 6 How. 163.
Butler v. Farnswork, C. C. 101.

"For the purposes of jurisdiction of the courts of the United States, domicil is the test of citizenship. A person cannot be a citizen of the State when he has abandoned his domicil there."

Poppenhausen v. India R. Co., 14 Fed. Rep. 707.
Case v. Clark, 5 Mason, 70.
Cooper v. Galbraith, 3 Wash. C. C. 546.
Lanz v. Randall, 4 Dill. 425.
Sheppard v. Graves, 14 How. 505.
Kenna v. Brockhaus, 5 Fed. Rep. 762.

All persons born or naturalized in the United States are, by the 14th amendment of the Constitution, "citizens of the United States and of the State where they *reside.*"

Now, what is the evidence? To that quoted on pages 50-1

of the brief of appellant, we add the following, which is prudently not quoted in that argument:

Q. Where does you son, J. N. Gilmer, now reside?
A. He resides in Memphis, Tennessee.
Q. When did he remove there?
A. I think he removed in April or May.
Q. Of this year?
A. Yes, sir, of this year.
Q. Did he take his family with him?
A. He did.
Q. Did he take his furniture with him?
A. He did.
Q. Is not his house at present furnished with the same furniture and pictures that were in it when he was there?
A. No, sir.
Q. I ask you if up to first October his furniture and effects were not in the house?
A. No, sir, his effects went with him.
Q. Did he remove all his furniture?
A. Yes, sir.
Q. Were not pictures left hanging on the wall of the house?
A. No, sir.
Tr. 83-4.
Q. Has he gone into any business in Tennessee?
A. He has.
Q. Have his businsss connections here been severed?
A. Yes, sir.
Q. Entirely?
A. Yes, sir, entirely.
Tr. 85.
Q. Do you know whether J. N. Gilmer sold his residence before he left?
A. He did.
Q. Did he sell any other property; did he sell his cows and horses?
A. He sold everything, sir, that he didn't carry with him.
Q. Before he went to Memphis?
A. Yes, sir.
Tr. 86.

This evidence not only does not show or indicate any fraud upon the lower court in setting up a false domicil in Tennessee, but it is entirely sufficient to establish the contrary, if the question had been a real issue in the case.

The appellee being in business in Alabama, with a family, and furniture, and property, including a residence, sells everything, and severing entirely his business connections, establishes his home and residence in Tennessee, and goes into business there.

Would not this satisfy, *prima facie*, any court in the world that Tennessee had become the domicil? But, we must add to this, the fact, that the party most interested in denying this conclusion and now insisting that it is not a legitimate deduction, with a full knowledge of the situation, admitted that the statement of the bill as to jurisdiction was correct, and waived the point by filing a plea in bar, and then waited till there was an adverse decision, before attempting his motion and suggestion in abatement.

By not making an issue on the question, the appellant hoped to avoid additional evidence which likely could have been produced to satisfy the court. Thus testimony of the intent might have been given. And of voting in Tennessee, &c., &c.

1 Whart. on Law of Ev. § 482.
2 Whart. on Law of Ev. § 955.
Whart. Conflict of Laws, § 62, *et seq.*
Hale v. Taylor, 45 N. H. 405.
Peck v. Crouse, 46 Barb. 151.
Bedell v. Chase, 34 N. Y. 386.
Seymour v. Wilson, 4 Kern. 567.
Kenna v. Brockhaus, 5 Fed. Rep. 762.

And it makes no difference that there may have been a contingent and "floating intention of returning" to the domicil of origin.

Merrill v. Morrissette, 76 Ala, 433.

"Jurisdiction depends on the state of things at the bringing of the action, and subsequent events cannot oust it."

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If it was competent, then, for the appellant to claim the benefit of a plea in abatement after a *trial* and decision on matters in

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If it was competent, then, for the appellant to claim the benefit of a plea in abatement after a *trial* and decision on matters in

bar (Alley v. Nott, 111 U. S. 472), and if the appellee had been put to trial on this irrelevant evidence without an opportunity of adducing proofs in his own behalf, it could not be said that the judgment of the circuit court was manifestly erroneous. The evidence relied on by the appellant, if unobjectionable in matter and form, and if brought upon a proper issue regularly made, is far from being sufficient to produce "the legal certainty" of conclusion requisite in such cases.

Barry v. Edmunds, 116 U. S. 559.

Hartogg v. Memory, 116 U. S. 588.

Ennis v. Smith, 14 How. 423.

Bryne v. Holt, 2 Wash. C. C. 282.

II. Res Adjudicata.

The general doctrine of *res adjudicata*, the English speaking world has accepted as perfectly expressed, in the response of the judges to the enquiries made of them in The Duchess of Knigston's case.

2 Smith's Lead. Cases [*785].

The rule there announced, with which alone we are concerned in this case, is the first of the deductions made, viz:

"That the *judgment* of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court."

This is a rule deduced from reason, and not drawn from the musty precedents of one system of laws, or founded on mere conventionality, and like all scientific principles is of universal application.

We accept it as a rule of right and justice, and this argument is not to escape it, but to defend it as the true canon of the law.

A minor rule, but one of great importance in the application of the general one thus stated, finds expression also in the same response, added by way of proviso and caution to the general deductions, and is this:

"But neither the judgment of a concurrent or exclusive jurisdiction is

evidence * * * of any matter to be inferred by argument from the judgment.'—*Ib.*

As otherwise expressed, the minor rule is thus stated:

Estoppels must be certain to every intent; and no implications are drawn in their favor which are not irresistible.

Russel v. Place, 94 U. S. 606.

2 Smith's Lead. Cases, 8 Am. Ed. 748, (807), 922, 923.

And the meaning of this rule, as applied to a plea of *res adjudicata*, is shown by the following extract from decisions of this court.

"When the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined; that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as to having settled that matter as to all future actions between the parties; and further, in cases where the record does not show that the matter was necessarily and directly found by the jury, evidence *aliunde*, consistent with the record, may be received to prove the fact. But even when it appears from the intrinsic evidence that the matter was properly within the issue controverted in the present suit, if it be not shown that the verdict and judgment necessarily involved its consideration, and determination, it will not be concluded."

Packet Co. v. Sickles, 5 Wall. 592.

"It must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former. If there be any uncertainty on this head in the record, as for example, if it appear that several distinct matters may have been litigated, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined. * * * According to Coke, an estoppel must be certain to every intent; and if upon the face of the record anything is left to conjecture, as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence."

Russel v. Ploce, 94 U. S. 606.

The Supreme court of Alabama quotes the rule given in the Duchess of Knigston's case, *supra*, and says:

"It cannot be overlooked, that this language lays down a strict rule;

yet, it is supported alike by reason and authority. The parties must be the same, the point must be directly in question, and *the judgment must be rendered on that point*. Any of these ingredients wanting, the defense fails."

Gilbrath v. Jones, 66 Ala. 132.
McCall v. Jones, 72 Ala. 371-2-3.

As otherwise expressed, the rule stands thus:

"And even the highest probability will not supply the place of definiteness and certainty. What a jury must have found may avail, but not what they may have found. The inference must be necessary and irresistible, excluding all doubt."

Wells on *Res Adjudicata*, §§ 215, 216, 224, 226, 227, 455.
Foster v. The Richard Busteed, 100 Mass. 409.
Burlen v. Shannon, 14 Gray, 433.
Burlen v. Shannon, 99 Mass. 200.
Woodgate v. Fleet, 44 N. Y. 13.
The People v. Johnson, 38 N. Y. 65-66.
Hooker v. Hubbard, 102 Mass. 245.
2 Smith's Lead. Cases, 8 Am. Ed., 748, (807), 920, 922, 923.
Mason v. Alston, 5 Selden, 28.

We have but to apply the general rule, under the limitations expressed in the authorities cited, which might be indefinitely multiplied, to see that the plea in this case was properly overruled.

The law of Alabama allowed the defendant to incorporate demurrers of any character in his answer, and required the submission at the same time of the whole cause. The language of the rule being: "It (the case) must be heard, without waiting for a separate decision on a demnrrer contained in an answer."

Code of 1876, § 3783.
Ib. Rule 73, p. 172.

The appellee, then, was forced to go to trial, on all issues presented by the defendant in his multifarious mode of pleading.

Such proceeding was unknown to the common law, or to the general rules applicable to chancery courts. According to that system, defenses having different gradations would have to be made successively, and not jointly. Matters in

abatement could not be joined with matters in bar of the action. Hence, in the application of the rule of *res adjudicata*, evolved from the contemplation of the orderly and logical system of the common law, to a system like that under consideration, which at once places before the court, for decision in the same cause, matters in abatement and in bar, such modifications and cautions as reason dictates must be observed, or we fall into error. No reasoning can be sound which overlooks such modifications and changes of circumstance.

In the case under consideration, the defendant interposed, besides any matter contained in this answer, five grounds of demurrer to the complainant's bill, which we have quoted above.

It must be obvious, that the effect of any decision on a submission on compound issues, such as these, or of matters in bar and in abatement, must, in reason, be the same as if they had been separately considered and decided.

A chancellor, in considering the proper judgment to be rendered in such a case, would necessarily have to analyze the issues presented, and resolve them into their distinct elements, and decide them successively, or at least separately.

If a matter to the jurisdiction of the court, and matter raising a question on the sufficiency of the allegations of the complaint, and matter in denial of allegations as grounds of relief, are presented at one time and in the same cause for decision, the judgment must necessarily rest upon the decision of these issues, or some of them, separately. There is no such thing possible as mixing and considering them jointly. By being presented at the same time, and on the same paper, they mutually exercise no influence upon the separate questions involved, and add no force or effect to one another, but are to all intents and purposes, as if presented separately and successively, according to this logical order. A multitude of issues cannot, by any conjunction,

form one of a composite character, as images in photography; but each preserves its identity, and must be met by matter pertinent to it alone.

It is plain, then, that in a case of this kind, in which various issues, of different grades, are submitted at one time to the decision of the court, a general judgment for the defendant which may be referred to, and be supported by, any one of the matters, cannot, in reason, be conclusive of all the issues.

There is, in such case, no certainty as to what the judgment was made to rest upon. And, as some of the matters may have gone only to the support of the particular action, it cannot be presumed, in support of the estoppel against a new action, that the former decision was more extensive than is necessary to sustain the judgment.—Authorities, *supra*, and Freeman on Judg't. §§ 267, 276.

In the case which is now pleaded as an adjudication fatal to the support of the present action, the decree does not specify any ground upon which it was rendered. If it stood by itself, then, it would be a clear case in which the judgment could be supported by referring it to any of the five grounds of demurrer. But, it does not so stand. The opinion of the Chancellor shows that he rested his decision on the defense of the statute of limitations of six years, one of the grounds of demurrer. His language, in the opinion, is: "The statute of limitations, therefore, is a bar to the rights of the complainant *in this cause;*" and his decree is, "that the complainant is not entitled to relief, and his bill of complaint is hereby dismissed out of this court."—Tr. 26.

"The ruling and judgment of the State court, on the former suit, is thus shown to have been upon demurrer to the bill, that the averments thereof did not make a case for relief."

Opinion of Bruce, J., Tr. 38.

Bell v. Hudson, 2 Am. S. Rep. 794.

The plain and simple question then is, does the dismissal

of the former bill on demurrer, bar a new suit avoiding that demurrer.

This question is not difficult of answer, either upon authority, or reason. Perhaps, it had as well be answered with an authority containing the reason:

"It is * * * settled, that if the plaintiff fails on demurrer in the first action, from the omission of an essential allegation in his declaration, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause as disclosed in the second declaration, were not heard and decided in the first action."

Gould v. R. R., 91 U. S. 533.
Gilman v. Rives, 10 Pet. 302.
Wells v. Moore, 49 Mo. 230.
Moore v. Dunn, 41 Ohio St. 62.
Aurora City v. West, 7 Wall., p. 99.
City of Los Angeloes v. Mellus, 59 Cal. 444.
Detrick v. Sharrar, 95 Pa. St. 521.
Pritchard v. Woodruff, 36 Ark. 196.
Lockett v. Lindsay, 1 Idaho, N. S. 324.
Chrisman v. Harman, 29 Gratt. 494.
Fowlkes v. State, 14 Lea, 14.
Terry v. Hammonds, 47 Cal. 35-6.
Morrell v. Morgan, 65 Cal. 576.
Gerrish v. Pratt, 6 Minn. 61.
Bonnifield v. Price, 1 Wy. Ter. 223.
Gist v. Davis, 29 Am. Dec. 91.
Lampen v. Kedgwin, 1 Mod 207.
Birch v. Funk, 2 Met. (Ky.) 547.
Gould on Plead. 478, §§ 44, 45, 46.
1 Chit. on Plead. *198.
Freeman on Judg't. § 267.

"A decision in favor of the defendant, on a demurrer at law, or to a bill in equity, is simply a decision that the plaintiff has not set forth a case entitling him to relief or compensation. *It does not, and in the nature of things cannot determine that he has no case, and shall not have relief in a subsequent proceeding on grounds different from those disclosed in the first.*"

2 Smith's Lead. Cases, 8 Am. Ed. 938.
Wilbur v. Gilmore, 38 Mass. (21 Pick.) 253.
Detrick v. Sharrar, 95 Pa. 526.

If the plaintiff be non-suit because his *probata* does not

agree with his *allegata*, he may bring a new suit to correspond with the *probata*.

Wilbur v. Gilmore, 38 Mass. 253.

Harding v. Hale, 2 Gray. 399.

Comparet v. Johnson, 6 Blackford, 59.

Gouldon Pl., *supra*.

If the point under discussion is "settled," as it certainly seems to be, it would appear superfluous to consider the philosophy upon which the rule rests. But, as this is the turning point of this case, it is well enough to contemplate, for a moment, the results of a contrary doctrine.

The common law effect of sustaining a demurrer to a bill, is to put the complainant out of court, "and no subsequent proceeding can be taken in the cause."

National Bank v. Carpenter, 101 U. S. 568.

1 Dan'l. Chan. Pr. Chap. 14, § 5, p. 597, 4 Am. Ed.

And after demurrer there was no such thing as amending. In Smith v. Barnes, 1 Dickens, 67, decided in 1755, the chancellor says, "there was no instance of liberty to amend."

Watkins v. Bush, 2 Dickens, 701.

National Bank v. Carpenter, 101 U. S. 568.

In case of the interposition of demurrers then, whether of a formal, trivial or serious nature, unless there was a right to commence anew, the complainant could not afford to risk a decision by the court, and conform his allegations and proof to that decision, since any adverse ruling, on the theory of the appellant, would conclude the whole dispute as to the subject matter; but would have to decide for himself every such objection; and either risk his case on the objection of a want of allegations, which, if necessary, might be supplied; or, yielding to the demurrer, on proving unnecessary allegations forced into his case by the demurrer.

Such a system would rarely reach the merits of any cause, and would certainly bring into contempt the administration of justice.

Judge Bruce, in his opinion on the sufficiency of the plea, says:

"The proposition of the plea seems to go to this extent: That a plaintiff, filing a bill of complaint in court, to enforce the right which he claims to be the subject-matter of his suit, must state, in his pleading, every ground and cause of action upon which he bases his right to recover; and, if he does not do so, and is met by demurrer, upon which the court decrees the plaintiff does not show any right to relief, and dismisses the bill of complaint, that such judgment is a bar, not only to a second suit stating the same cause of action, but equally a bar to any bill of complaint which the plaintiff might file upon any other possible ground or theory of his right to recover."—Tr. 39.

Since the law ranks as a rational science, and since the *allegata* of its pleading is the only matter for consideration and judgment, when the issue is one of law, and since every judgment must, even when expressly purporting to go beyond the issue submitted, "be limited by construction, so that its effects shall be such, and such only, as is needed for the purposes of the case that has been made, and the issues that have been decided," (122 U. S. 14; 3 Wall. 710–11), it is plain that the judges of the lower court correctly repudiated the pretensions of this plea, and held it insufficient in this:

1. That it does not aver, but that the decision of the former suit was made upon the demurrers, which are avoided in the present suit.

2. That it appears by the plea, that the decision in the former suit was made upon the demurrer of the statute of limitations, which is avoided in the present suit.

3. That there is no averment that any fact essential to sustain the present action, was directly in issue in the former suit, and that the judgment of the court in that suit was based on a finding of such fact adversely to the complainant.

4. That it appears that the cause of action in the present suit, is different from that in the former suit.

5. That it does not distinctly appear, from the plea, that the case made by the bill was ever heard and determined on the merits in any prior suit.

III. Res Adjudicata.

The lower court in overruling the plea of *res judicata*, as a full answer to the bill, expressly allowed it to stand as an answer to so much of the bill as was founded on the pledge of 1871, irrespective of any acknowledgment, express or implied, after that time.—Tr. 44.

In other words, the court, reading the allegations of the former bill as on demurrer, and thus most strongly against the pleader, and adopting the construction put upon the bill both by the lower and Supreme Court, as not containing any "averment * * of any recognition * of any * trust relationship * between the original transaction and the filing of the bill," (Tr. 27), gave full effect to the *res adjudicata* of the former judgment, by holding, that if the complainant failed to make good in proof the transactions alleged in this bill as occurring after 1871, the judgment of the former suit would bar all relief in this case.

This was strictly according to the precedents.

King v. Taylor, 6 John. Ch. 253–4.

Orcutt v. Orms, 3 Paige, 462.

There was no leave asked or granted, either to amend the plea, or to urge in the answer, the matter set up in the plea and adjudged, on its disallowance.

The effect of overruling the plea, was "to impose on the defendant the necessity of making a new defense."

1 Danl. Chan. Pra., 4 Am. Ed. 701, title, "Overruling Pleas."

"When a plea has been overruled on the merits, the same matter can not be set up in the answer as a bar to the suit, without the special permission of the court."

Ib. 702, note 7.

Townsend v. Townsend, 2 Paige, 413.

Coster v. Murray, 7 John. Ch. 172.

The repetition, then, of the substance of the plea in this case in the answer, had no further effect than to make it available as a defense, to the extent and within the limits

marked by the judgment upon the plea; beyond that it was impertinent.

The record in the former suit was a part of the plea, and the proceedings being all in writing and the issues precise, there was no possibility of extending the scope of the estoppel of that judgment beyond the record itself.

IV. Res Adjudicata.

We now propose to notice the various arguments of the appellant upon this question.

It is insisted, that, as the bill in the State court was dismissed without qualification, there is a presumption indulged, that it was upon the merits, and that consequently it is a bar to this suit. And several authorities of this court and other courts are cited to sustain the position, and amongst them, Durant v. Essex Co., 7 Wall. 107; House v. Mullen, 22 Wall. 47; Aurora City v. West, 7 Wall. 83; Bissell v. Spring Valley Township, 124 U. S. 225; Lyon v. P. & G. Man'g'f. Co. 125 U. S. 698; Case v. Beauregard, 101 U. S. 688; Alley v. Nott, 111 U. S. 472, and Beloit v. Morgan, 7 Wall. 619.

The court rendering these opinions is the same court which approved and promulgated the general rules previously quoted—in some instances, the judges rendering the opinions are the same. Now, as there is nothing in these cases expressly referring to, and overruling any of the cases previously quoted, we should naturally infer that they are not inconsistent, and that they can be reconciled. And this, we affirm, can be done without difficulty.

In the first place, it is proper to examine what was the specific question before the court in each instance, and see if the matter, in the cases relied on by the appellant, is a judgment in reponse to the point involved, or a *dictum*, unnecesssary to its decision, and then consider the *dictum*, if it is found to be one, in reference to what was in the contemplation of the court.

In Case v. Beauregard, 101 U. S. 688, it was held that the new allegation, showing a judgment and return of no property found, was wholly unnecessary. That proof of such allegations is only evidence that the legal remedy is exhausted, and that the party has a right to appeal to equity, and that in the prior suit such allegations were made as to possess the court as fully of the case as if the new allegations had been inserted and proved, and therefore the court in the former suit, having jurisdiction and having decided the same identical cause of action on the merits, of course, there was no room to dispute that it was a bar to the second suit.

We see nothing in this case to dispute, deny or explain. The case of Alley v. Nott, 111 U. S. 472, is as little in the way. "The only question argued and decided in this case was, whether the cause was properly removed from the State court * after a general demurrer to the complaint, for showing no cause of action, had been heard and overruled with leave to answer and answer had been filed." See statement of case, 111 U. S. 472. It was held that a *trial* having taken place on demurrer, it was too late to remove the cause under a law which said it must be done, if at all, before *trial*. No one disputes that a trial on demurrer is a trial of the cause of action stated, on its merits, and is a bar to any further suit on that cause of action; but the case does not say that by presumption the estoppel shall extend beyond the pleadings and cover material matters not alleged.

In House v. Mullen, 22 Wall. 47, there was no question of *res adjudicata* before the court, and any remark there on the subject is hence a *dictum*. Carroll v. Carroll, 16 How. 287.

Aurora City v. West, 7 Wall. 82, is a case for the appellee in all particulars. See remarks of Judge Bruce on this case. —Tr. p. 40. On a question of law, raised on the sufficiency of pleading, "what might have been offered to maintain the case" would be legal arguments, not averments confessing the demurrer and avoiding it by new allegations.

In the case now pleaded as a *res adjudicata*, the question was one of law, on the sufficiency of the bill. And we admit that the decree holding it insufficient and dismissing it out of court, concludes us as to every argument which "might have been" urged to induce a contrary conclusion. But, we do not admit, nor does the case in 7 Wall. *supra*, or any other authority, hold that an adverse ruling on such a point does, or can conclude matters not alleged. If such was the case how could amendments after demurrer even be entertained?

In Durant v. Essex, 7 Wall. 107, two questions only were presented, both of which are decided in the same way in Durant v. Essex, 8 Allen, 103. One of these questions was, whether a division of the court on points involved, impaired the *res adjudicata* of the judgment of affirmance. Which, of course, has nothing to do with this case.

The other question was, whether a dismissal of a bill, brought to issue on the merits and referred to the court for decision, would be construed with reference to the issue involved, and stand as a *res judicata*.

There could be but one decision rendered on this point. The court held that the judgment would be referred to the issue, and would be decisive of it. This, if a presumption, is an irresistible one; and is strictly within the principles above adverted to; that we may reason back from a judgment to its basis.

Wells on *Res Adjudicata*, § 226.

There was nothing new in this decision. It is stated in the case between same parties in 8 Allen, 108, that such has always been the effect of a decree dismissing a bill in equity after hearing, when it is not expressed to be dismissed without prejudice. But this court, and the court of Massachusetts, made this decision in contemplation of the mode of proceeding obtaining in Chancery courts according to the English practice, in which the only issues involved on the hearing, after replication and testimony, would be the merits.

In such case, there is either only one issue, or several issues of the same grade, going directly to the full merits of the complainant's case, and to give the judgment denying relief to the plaintiff any effect, it must be referred to issues fatal to a new suit for the same cause.

But, suppose to a complainant's bill to redeem a pledge of stock, as in this case, the defendant should put in an answer in express terms, admitting the right to relief, except for five grounds of demurrer incorporated in the answer, which we will suppose identical with those urged to the bill in the former suit in this instance. See Tr. 22.

Now suppose this case referred to a court for decision, and a decree rendered, dismissing the bill without qualification, and the decree set up as a *res adjudicata* to a new complaint or bill, containing allegations avoiding every ground of demurrer in the first suit, could this, or any court, giving force only to reasonable presumptions, not to say irresistible conclusions, refer the judgment of the former suit, to an adjudication adverse to the title to the subject matter of the two suits, which was expressly admitted in the first suit?

Such an idea is preposterous. The distinguished judge delivering the opinion in Durant v. Essex, 7 Wall., *supra*, had no idea of recanting the doctrine of this court expressed in the previous case of Packet Co. v. Sickles, 5 Wall., above quoted, which in the subsequent case of Russel v. Place, 94 U. S., *supra*, he announced as his own. In that case he refers to the strong cases of Aiken v. Peck, 22 Vermont, 260, and Hooker v. Hubbard, 102 Mass. 245, and says:

"If, upon the face of a record anything is left to conjecture as to what was necessarily involved and *decided*, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence."

But, it will doubtless be urged, that this strictness as to estoppel only applies to cases at law, and that in equity every possible presumption is to be indulged in their

favor. And, in support of this view, it will be said: the cases of Bigelow v. Windsor, 1 Gray, 297, and Foster v. Gibbs, *ib.* 412, decide that a dismissal in equity, without qualification, will be presumed to be upon the merits, as also is generally remarked in Durant v. Essex, 7 Wall. *supra*; and that Mr. Justice Lamar, in the late case of Lyon v. P. & G. Manf. Co., 125 U. S. 698, approves the same idea.

Presumption is but another name for a result or operation of the due exercise of reason. And if it is reasonable for the due administration of justice, that estoppels at law should be certain to every intent, it would be difficult to assign a reason for a different rule in equity. If anything, they should be more strict in the latter, since the whole proceedings are in writing and the issues precise.

Accordingly, it is held, in the case of Foster v. The Richard Busteed, 100 Mass. 409, on a review of the cases above cited in 1 Gray, and of the authorities generally, that the rule is precisely the same at law and in equity. The language of the court is:

"But it is urged that in equity on entry of bill dismissed, *prima facie* imports the dismissal is on the merits, and therefore a bar to future proceedings. Bigelow v. Winsor, 1 Gray, 299; Foote v Gibbs, *ib.* 412; Durant v. Essex Co., 8 Allen, 103. *There is no essential difference between the effect of a decree in equity and of a common law judgment, in this respect.* * * * And where in the answer various matters of defense are set forth, some of which relate only to the maintenance of the suit, and others to the merits, and there is a general decree of bill dismissed, from which it does not appear what was the prevailing ground of the defense, *it is impossible to hold that the decree operates to preclude future proceedings.*"

Burlen v. Shannon, 14 Gray, 433.
Burlen v. Shannon, 99 Mass. 200.
Hooker v. Hubbard, 102 Mass. 245.
Chrisman v. Harman, 29 Gratt. 501.

So far as the point up for decision, and actually passed upon in 125 U. S. 700, is concerned, it is impossible to complain. The plea of *res judicata* there, was supported by a decree on its face rendered upon the merits, and absolute in terms; and the question was, whether the record could be

contradicted by parol testimony. There was no room for any presumption or doubt in this case, as it was said there was none in Durant v. Essex, 7 Wall., *supra*. There was an issue, and a decision, and the decree expressly rested upon that issue; but, if it had not done so expressly, by presumption irresistible, it would be referred to the issue, and thus be a bar.

But, if there had been "in the answer various matters of defense set forth," some in abatement and others in bar, and the dismissal had been general merely, but without qualification, would this court, in view of the reason involved, have been willing to adopt upon any authority, and to announce as a general proposition, that a judgment in equity, which may with equal propriety be referred to a dozen issues for support, shall, by presumption, be referred to the one most favorable to the party setting up the estoppel?

Burlen v. Shannon, 99 Mass. 200.

Lea v. Lea, *Ib.* 493.

Chrisman v. Harman, 29 Grat. 501.

Foster v. Busteed, 100 Mass. 409.

Wells on Res Adjudicata, §§ 215-16, 276.

The cases in 1 Gray, *supra*, must be considered in connection with those in the later reports, in the same State, overruling them, and the expressions relied on in Durant v. Essex, 7 Wall. 108, and 125 U. S. 700, must be considered in connection with the prior and later decisions of this court, that any want of certainty in estoppels is fatal, and all must be considered as *dicta*, (Carroll v. Carroll, 16 How. 287), but correct enough, perhaps, when it is understood that they had in contemplation a system that did not submit matters in bar and in abatement for decision at the same time, and therefore simply declare, that the court will in all cases indulge the irresistible presumption, that the issue submitted and necessarily involved in the judgment, was decided, whether the judgment specifically so says or not.

This brings us to consider something of the purpose and

potency of the words "without prejudice" accompanying a dismissal in equity.

It often occurred that the best of causes were defeated on a trial, on the merits, on account of some little slip in evidence or in the pleadings, when it would be too late to have an entry made of voluntary dismissal, as of a non-suit at law, and in which justice required that the plaintiff should have an opportunity of making out his case. To enable the plaintiff in such case to bring a new suit, *for the same identical cause of action*, the court directed the dismissal to be "without prejudice."

2 Danl. Ch. Pr. Ch. 26, Sec. 1.

The practice of using the words, then, originated in the purpose of limiting the natural and logical effect of the judgment.

Their omission, from whatever cause, can not possibly extend the natural and logical effect of any *res adjudicata* beyond the scope of the issues submitted and *decided* by the court. No court can possibly have any right "to regulate the extent and effect which may arise ~~and~~ from its judgment as a matter of evidence in any future controversy"; "and a dismissal without any reservation could only be a bar, as to matters in issue (in the cause) between the same parties."

The Corporation of Rochester v. Lee, 1 Mac. & G. 470.

"Every decree in a suit in equity must be considered in connection with the pleadings, and if its language is broader than is required, it will be limited by construction, so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided."

"It is our duty to construe the decree with reference to *the issue* it was meant to decide." And an intent to decree beyond the issue can not be ascribed to any court, "nor could we approve such action, even if were the intent, clear beyond dispute."

Barnes v. Chicago Railway, 122 U. S. 14.

Graham v. Railroad, 3 Wall. 710-11.

Here, we have matter to end this dispute about the extent of the *res adjudicata* of the former suit, on the theory of presumption.

In the first place, there is no room whatever for the exercise of any presumption. The record shows in most express terms, that the decision was on the demurrer, (Tr. 26, 31), which is avoided in the present suit. In the next place, there is nothing else for it to stand on, since the demurrers were, really, the only *issues* in the case.

It may be said that this is not so, and that the answer denied the property right of the complainant. It is true the answer makes this denial in the abstract, but it also sets out and admits facts inconsistent with this legal conclusion of the appellant, and which establish every allegagation of the bill.—Tr. 20-1-2. It is needless to affirm to this court, that an answer which denies matters in the "abstract, but admits all the facts and circumstances necessary * * in the concrete" to establish such matters, is a plenary admission. Doss v. Tyack, 14 How., p. 313. And, besides, the evidence proved the bill beyond dispute.

And, beyond this, the chancellor recognizing and finding, as the Supreme Court itself does, that the allegations of the bill are true, and, thus, that the complainant did once have a cause of action, goes on to consider questions which could only arise on the theory that the property of the subject-matter of the suit was in the plaintiff. Thus, the chancellor says: "Now, the question to be determined is, whether Josiah Morris has held the legal title and the possession of the stock for more than six years. 2. Whether J. N. Gilmer has asserted or Morris has recognized any equity or lien during the six years before the filing of this bill."

Tr. 24 (bottom of page.)

And he finally concludes: "The statute of limitations therefore is a bar to the rights of the complainant in this cause."—Tr. 26.

It thus appears, not only that the chancellor expressly put his decree upon the demu rrer, but that, conceding that the plaintiff's right was established, except for the defense of time, he went into an unwarranted investigation of the proofs of acknowledgements since the original transaction.

But the pleadings gave the chancellor no warrant for that investigation. The demurrer was:

1. "That the *facts alleged* show that the demand is stale. 2. That it is barred by the statute of limitations.—Tr. 22.

And of course, as the bill did not contain "averments of recognition" there could be no judicial investigation of *evidence* of such recognitions.

Piatt v. Vattier, 9 Pet. 413.

Harrison v. Nixon, *Ib.* 503.

In the suit in the State court, then, the original pledge and all essential allegations of the bill were established by the answer and found by the court; and, hence, giving force to the admissions of the answer, (Tr. 20-1-2) no defense whatever was offered, except by demurrer. And, therefore, if the record had not put the decision explicitly on the demurrer, irrestible presumption would have so placed it, since there is nothing else for the decree to stand on.

Wells on *Res Adjudicata*, 266-7.

But, it may be said, that, notwithstanding the chancellor puts his decree on the statute of limitations, (Tr. 26), which defense was raised by demurrer, Judge Stone, in response to an application made to the court after affirmance of the decree of the chancellor, in his opinion, says, the chancellor decided on the evidence and found the demand "stale." Tr. 34.

This is true; but, the same judge affirms, as matter of law, that as soon as a pledge of stock is perfected in the only legal mode, by transfer on the books of the company, the pledgee becomes an adverse holder against the pledgor, and becomes the owner of the stock in fee at the end of six years. And he actually approved the application of the statute of limitations, in the case by the chancellor, in an opinion in which he quotes the evidence of the pledgee showing a pledge for future debts.—Tr. 33.

And he agreed to the opinion of the only other judge, finding expressly that there was "a tacit understanding that the stock was to stand good as a pledge for future advances." Tr. 372-3.

After such a mistake of law as this, which went to establish the principle directly within the terms of what this court, speaking through one of its greatest members, says, "would shock that sense of right which must be felt equally by legislators and by judges" (Kirk v. Smith, 9 Wheat. 288), we may be pardoned for affirming that this statement or conclusion of fact, as to what the chancellor rested his decision on, is erroneous, when we find it contradicted expressly by the record, and when we find, moreover, that his version of what the chancellor did was a legal impossibility. The chancellor says, "The statute of limitations, therefore, is a bar to the rights of the complainant in this cause." Tr. 26. The defense of limitations was by demurrer; and the Supreme Court finds itself that "the defense of the statute of limitations of six years (is) the ground upon which the case was decided by the chancellor."—Tr. p. 31.

But, Judge Stone, who had just found (by concurrence) as last quoted, says, on the application to modify the decree, "The ruling of the chancellor was on the testimony, and governed by it alone he reached the conclusion that the complainant's claim was barred by *staleness*."

But, the defense of staleness, like that of limitations, was, as it may be, a ground of demurrer.—Tr. 22.

Speidel v. Henrici, 120 U. S. 387.
Maxwell v. Kennedy, 8 How. 210.
National Bank v. Carpenter, 101 U. S. 567.
Lansdale v. Smith, 106 U. S. 371.

And the issue presented by that is described in legal language, as an admission of the facts alleged (by the plaintiff) but a denial of their legal operation in his favor.

Gould on Plead. 24, § 23.
Bell v. Hudson, 2 Am. State Rep. 7, 94.

How, on deciding such an issue, the chancellor could look to the "testimony," we are at a loss to comprehend.

On this question of fact, then, as to what the chancellor's decision rests on, we must repudiate the opinion of Judge

Stone, and rely on the record, and the evidence of our own senses.

It is true, we admit, that the chancellor, in his opinion, says, "I am not able to discover that Mr. Morris has so recognized the rights of Mr. Gilmer as to interrupt the running of the statute of limitations."—Tr. 25. But, no such matter was referred to him to decide. The issue submitted to him, and which he decided, was: whether, admitting all the allegations of the bill as true, the plaintiff, under the law as applied thereto, had stated a cause of action free from the bar of the statute of limitations of six years, in favor of adverse holders.

The chancellor was asked to decide whether, under the law, allegations of recognition of a pledge should be avered in the case stated, and not whether recognitions not alleged were proven. And as "the *allegata* and *probata* must reciprocally meet and conform," and as "it is our duty to construe the decree with reference to the issue, it was meant to decide," and limit the judgment by construction to the issue, nothing could be plainer than that this action of the chancellor upon matter beyond the issue, was *coram non judice* and void.

Barnes v. Chicago Railway, 122 U. S. 14.
Graham v. Railroad, 3 Wall. 710–11.
Wells on Res Adjudicata, §§ 226–227.
Yates v. Briggs, 95 Ill. 83.
Harrison v. Nixon, 9 Pet. 503.
Piatt v. Vatier, 9 Pet. 413.
1 Green. Ev. § 528.

This brings us to consider the case of Bissell v. Spring Valley Township, 124 U. S. 225, which the counsel for appellant think decides that appellee should have amended his bill in the State court, and that not having done so, he is barred in this suit.

So far as the case in 124 U. S., *supra*, is concerned, we subscribe heartily to everything decided. But, of course, in that, as in every case, the decision must be considered in reference to what the court had before it.

The demurrer there was to a plea denying the validity of the bonds by the defendant. The plea was a special *non est factum*, stating that the clerk of the county never signed his name to the bonds and coupons, nor authorized any other person to do so. A demurrer being interposed, the same was overruled (*not sustained, as stated by mistake on page* 230 *of* 124 *U. S.;* see 110 U. S., p. 165), and the judgment was really for the want of a replication. In other words, the plaintiff stood by his demurrer to the defendant's plea, and by doing so, in effect said: "If the plea is good in law, I confess it cannot be answered by *any matter of fact*," and, of course, a judgment for the want of a replication is as conclusive for a defendant, as a judgment *nil dicit* is for a plaintiff.

See Aurora City v. West, 7 Wall., pp. 98–99.

It is necessarily conclusive of every defense which could have been urged against the plea, and, therefore, established the plea and its legal effect in the second suit in 124 U. S. 230. The invalidity of the bonds being thus conclusively established between the parties in the first suit, the second suit could not be maintained upon the coupons of the same issue of bonds, without calling in question the force and effect of the former judgment, and hence the plea of *res adjudicata* was good.

The same principles exactly, and nothing more, are declared in Aurora City v. West, 7 Wall. 82, and Beloit v. Morgan, *Ib.* 619, so much relied on by counsel for appellant.

But, suppose the case discussed in 124 U. S., *supra*, had been, as in this, a demurrer to the complaint or bill, alleging that the law operating upon all the facts stated in the declaration, or bill, did not "constitute a cause of action."

Gould's Plead., Chap. 2, § 43.

A joinder in such an issue, and a judgment thereon in favor of the demurrer, simply decides that the facts averred "are in no wise sufficient in law, and that the defendant is

not obliged by the law of the land, in any manner, to answer the same."

Ib., note 6.

"A decision in favor of the defendant, on a demurrer at law, or to a bill in equity, is simply a decision that the plaintiff has not set forth a case entitling him to relief or compensation. It does not, and, in the nature of things, cannot determine that he has no case, and shall not have relief in a subsequent proceeding, on grounds different from those disclosed in the first.

2 Smith's Lead. Cases, 8 Am. Ed. 938.

Or, as Gould puts it:

"The effect of such a judgment is, that the plaintiff can never afterwards maintain, against the same defendant or his privies, any similar or concurrent action, for the same cause; *i. e.* upon the *same grounds*, as were disclosed in the first declaration."

Gould on Pl., chap. 9, § 44.

"But, if the plaintiff, on demurrer, fails in his first action, from the omission of an essential allegation in his declaration, which allegation is supplied in the second; the judgment in the first is no bar to the second; although both actions were brought to enforce the same right. For, in this case, the merits of the cause, as disclosed in the second declaration, were not decided in the first."

Ib., § 45.

There is nothing in the case, in 124 U. S. 225, or in any of the cases cited therein, at all in conflict with these principles; in fact, the judge delivering the opinion in that case, is the same one who endorsed them in Russel v. Place, 94 U. S. 606, and he approved the same in Gould v. Evansville, R. R. Co., 91 U. S. 534, in which this court adopts the very expressions of Gould.

The remarks of the judge then, in 124 U. S., on page 232, that "if the party against whom a ruling is made on a demurrer wishes to avoid the effect of the demurrer as an admission of the facts in the pleading demurred to, he should seek to amend his pleading or answer, as the case may be, &c.," must be construed with reference to the case in point, in which the demurrer to a plea was overruled and the plaintiff declined to reply, and not to a case in which the demurrer to a declaration or bill was sustained and the bill dismissed (in vacation), to which it is apparent they can have little, or no application.

It only remains, on this branch of the defense, to examine the two bills, and to see whether the defects of the first bill are cured in the second, and whether the grounds set up for relief in the second are the same as those in the first. If they are identical, or if they are substantially the same, we confess that the *res adjudicata* of the former suit concludes us, no matter how erroneous the judgment may have been.

The first bill alleged the pledge of 1871, when the 60 shares remaining, after the transaction with Linn, whereby the original cost of the subscription of $6,000 was paid, were transferred to appellant for the balance of interest still due him on the purchase.—Tr. 18.

There was no allegation of any subsequent transactions between that date and the filing of the bill in 1884.

The Supreme Court says:

"The bill was filed on the 7th day of July, in the year 1884, or more than thirteen years after the original deposit. There is neither averment nor satisfactory proof of any recognition on the defendant, Josiah Morris', part of any existing trust relationship between himself and the complainant intermediate between the time of the original transaction and the filing of the bill." Tr. 27

To this bill the defendant demurred, saying: "And respondent demurs to said bill because—

1. The *facts alleged show* that the demand is stale.
2. That it is barred by the statute of limitations."

Also setting out three other grounds of demurrer.

Tr. 22.

The judgment was either a general dismissal, referable to any one of the five grounds of demurrer, or to that of the statute of limitations, as shown by the chancellor's opinion. As the ground most favorable to the appellant, we assume that it was that of the statute of limitations, for, otherwise, we could say the demurrer was sustained and bill dismissed, because there was no tender, &c.

Chrisman v. Harman, 29 Grat. 501.

The decision, then, was, that *on the facts stated*, to-wit, the original pledge in 1871, without allegation of recogni-

tion within six years, there was "*no cause*" of action stated.

Veeder v. Baker, 83 N. Y. 162.

Spiedel v. Henrici, 120 U. S. 387.

2 Smith's Lead. Cases, 928, 8th Am. Ed.

Bell v. Hudson, 2 Am. State Rep. 794.

National Bank v. Carpenter, 101 U. S. 567.

The present bill setting out by way of inducement the substance of the first bill for the purpose of giving the history of the transaction, adds, that in 1875 and 1876, and afterwards, as plaintiff formed successive firms, up to about 1884, the complainant and defendant below so contracted with reference to said stock, that it stood as a security to defendant, and to his firm of Josiah Morris & Co., with whom complainant and his firms did a banking business until about the same time, for specific debts mentioned, as well as for all advances which might be made to complainant and his firms by defendant and his said firm; and that these agreements were acted on, and that advances were made on them during the whole of said period; and that the defendant continuously acknowledged his trust relation to said stock during the whole of said period; and that, up to the year 1875, said stock stood upon the books of said company in the name of complainant, and that, being levied on under an execution to pay complainant's debt, defendant below specially agreed to pay said debt and to transfer said stock on the books of said company and to hold the same as a security therefor, and that said debt was paid by defendant below, and charged to complainant below under said agreement, and afterwards paid by him, and that said stock was transferred and held as thus agreed between complainant and defendant.

The foregoing is the substance of the new allegations in the present bill.

Tr. 1 to 7.

If these allegations had been contained in the first bill, could the Supreme court have said: "There is no averment of any recognition * intermediate between the original

transaction (1871) and the filing of the bill (1884)?" Tr. 27.

Giving, then, the fullest force to the *res adjudicata* of the former suit, it settles no fact, adversely to the complainant below, essential to the maintenance of the present cause of action.

The only essential matter common to the two complaints, is that of the general property of the complainant below in the stock. And that question, as we have seen, was not raised in the former trial, and, certainly, if raised, was adjudicated against the defendant below, for the chancellor found a pledge to exist, and asserts in his opinion that: "His (Morris') holding was always subject to Gilmer's right to redeem." Tr. 26.

That complaint was adjudged ill, i. e., is as containing "*no cause of action*" for the defendant to answer, because barred on its *face* by limitations.

The present complaint, setting out the matters of the former complaint by way of inducement, (Stowell v. Chamberlain, 60 N. Y. 275), commences with new matter in 1875, and shows distinctly new pledges of the same property for other and distinct debts, including those between other and distinct parties, and avers continuous recognitions, on the part of the defendant below, up to 1884.

"The evidence (to support these two actions) was the same only up to a given point, and from that point there was a divergence, showing conclusively, that the causes were not the same."

Stowell v. Chamberlain, 60 N. Y. 278.

The point of divergence in the two cases, was what occurred in 1875 and afterwards, as alleged in this suit.

If the law, as applied to the latter, would have raised different obligations and rights of parties respecting the subject matter of the suit, from what would be raised from the allegations of the first bill, it is evident that proof, on the first trial, of the facts alleged in the second bill, would have shown a fatal variance between the *allegata* and the *probata*.

Not only did the second bill contain allegations of matter

showing that limitations could not apply, which, being essential to be alleged in order to be proved, and essential to be proved to make out a case, would itself constitute a new cause of action from the first bill, (Piatt v. Vatier, 9 Pet. 413; Veeder v. Baker, 83 N. Y. 162; Bonnifield v. Price, 1 Wy. Ter. 234; Morrell v. Morgan, 65 Cal. 576; 59 Cal. 451; 47 Cal. 55; 1 Idaho, 324; 95 Pa. S. 526), but, averred in addition, pledges of the stock to the defendant for debts due to his firm against complainant and his several firms, up to 1884.

Whereby the original agreement was so far abandoned, that it only formed a constituent part of a new contract, based upon new considerations and embracing different debts, due to and from distinct and different parties, and thus raising different rights and imposing different obligations, respecting the subject matter.

What could possibly be plainer than that this is a new cause of action; "for a new case it is, if founded on a new agreement."

Note b, 2 Sch. and Lef., p. 11.

The new agreements, necessarily, superseded and discharged the old, and therefore proof of the new, on mere allegations of the first, would have been a fatal variance.

Billingslea v. Harrell, 11 Ala. 775.

3 Am. and Eng. Enc. of Law, 890-1, § 58, 59, and notes.

McKinley v. Irvine, 13 Ala. 681.

This brings up for consideration, what is a cause of action. It certainly is neither the thing, nor the title to the thing. These may exist independently of "adversary claims" which alone are litigated, and therefore, are distinct from the cause or right of action. When analyzed, the cause of action, as a whole, must be regarded as those facts, shown in the allegations of pleading, essential to give a party a standing in court and right to judgment.

It is a statement of those facts, which if admitted, or shown to be true, entitle the plaintiff, under the law, as a

major premise, applied to them as a minor proposition to the judgment prayed.

Gould's Plead. Chap. 1, §§ 3, 4, 5, 6, 7, 8.

From which it is plain, that, if a demurrer is interposed to a pleading, because the law, operating on the facts stated, does not constitute *any cause of action*, and, on being sustained, the same pleading is amended, or a new action is brought, so as to supply the defect and to constitute a (good) *cause of action*, the *res adjudicata* on the demurrer, "in the nature of things," can be no obstacle to the amended pleading, or new suit. For the first was adjudicated to contain "no cause of action." While the amended pleading or new suit, by the addition of essential allegations, becomes, what the former was not, a cause of action, and, therefore, the two are not identical in substance.

Veeder v. Baker, 83 N. Y. 162.

The judgment in the first is not, that any or all the facts alleged do not exist, nor that the plaintiff has no cause of action with reference to the subject-matter, but only that the law operating on all the facts stated, constitutes no cause.

The second suit admits all this, but, alleging some new fact or facts, merely insists that, with these, the plaintiff has a standing in court.

47 Cal. 35; 59 Cal. 451; 65 Cal. 576; 95 Pa. S. 526; 1 Idaho, 329.

In the nature of things, then, the effect of sustaining a demurrer to a bill or declaration must be limited to settling the single matter decided; that the facts stated in the pleading objected to, are insufficient in law to constitute a cause of action; and not that, in connection with other facts, they may not make up a good cause of action. The cause of action involves not only the right or title of the plaintiff to the subject-matter of the suit, but of course the breach of some duty or obligation on the part of the defendant, respecting the subject-matter, towards the plaintiff.

In the present instance, we will assume that it is true, as

alleged in the bill in this case, that in 1875, and afterwards up to 1884, the stock became pledged to secure all old and future debts of complainant, and his firms, to Morris and his firm.

There was, then, no obligation or duty on the part of Morris to return the stock until all his debts were paid.

By turning to schedule A, page 383 of the transcript, it will be seen that these debts were not extinguished until the dividend of $300 on the 1st August, 1884, was received; and, thus, that, if the present bill had been filed on the 7th July, 1884, when the first was filed, it could not have been sustained. In other words, that, on the facts alleged in this case, there was *no cause* of action on the 7th July, 1884.

Tally v. Savings Bank, 93 U. S. 321.

Robinson v. Hurley, 78 Am. Dec., note, p. 506.

And, doubly, there was no cause in the first bill.

1. Because it only alleged the original pledge of 1871, and contained no averment of recognition to the filing of the bill on the 7th July, 1884, which was held on demurrer, at the instance of appellant, to show a case barred by limitations.

2. Because, while the allegations only showed a pledge for one debt, the evidence showed other and distinct pledges for other and distinct debts, due to, and from different parties, which were then unsatisfied, and for which Morris still had the right to retain the stock.

The first ground defeated the bill; but the second would have been equally as fatal, as showing both a variance between the allegations and proof, and no breach of the contract, and therefore no right to sue even on the case proven, without a tender.

1 Green. Ev. § 63.

Tally v. Savings Bank, 93 U. S. 321.

Robinson v. Hurley, 79 Am. Dec., note, p. 506.

Now, it is plain, as is shown in the case of Stowell v.

Chamberlain, 60 N. Y. 272, and as appears in every case for the specific performance of different agreements for the sale of the same land between the same parties, (note b, 2 Sch. & Lef., p. 11), and in an infinite variety of other cases, when several and distinct agreements are made respecting the subject-matter, the different causes of action may have a common basis in the original title of the plaintiff to the subject-matter, and yet may have a point of divergence (in allegation, and, hence, in proof), which would put entirely, or substantially different obligations upon the defendant, and thus would constitute different causes of action.

And, if an action was, in the case of successive contracts superseding prior ones respecting the same subject-matter, instituted upon a supposed cause of action arising out of the first contract, and the same was defeated by an issue of law or fact, *not involving the original title*, it would be impossible to hold the *res adjudicata* of that suit as any bar to a new suit, to enforce the obligation of the defendant respecting the same subject-matter, arising out of a subsequent and distinct agreement. In both suits, the original title would be a common basis. In neither, might that title be disputed or called in question; and in both, the dispute or issue, and sole matter to be tried, might be the nature and extent of the legal obligation imposed upon the defendant, by the separate and distinct contracts, or the fact of the existence of such contracts.

Thus, in the case at bar, there was no dispute or issue as to the original title of the complainant in the first suit, nor is there any in the present suit. It is true, as we have shown, that there was a denial in the answer in the abstract of the complainant's title, but in the concrete the admissions were plenary to establish the fact; and, moreover, the chancellor finds title with the complainant, saying, "he always had the right to redeem," and bases his decree on assumptions of original title in the complainant—by finding his original title barred by limitations.

The fact, then, that the original title of the complainant,

or subject matter, is the same in the two suits, makes not the slightest difference, because the allegations to sustain the latter make it rest upon subsequent agreements founded upon different considerations, and raising different rights and obligations respecting the subject matter from those in the first bill, and in fact showing the abrogation and abandonment of the first agreement, and the substitution of another, having a distinct and separate identity.

It is, therefore, out of the question, to say, that the pretended cause of action alleged in the first suit, which was held "no cause," on account of being barred on the face of the bill, and which was shown by the evidence to be "no cause," for the reason that it appeared that the first pledge was superseded by the new and subsequent contracts, giving a right to hold for debts not then paid, is the same cause as that stated in this bill.

If the obligation of the defendant and right of the complainant are different in two cases; and if they arise from separate and distinct agreements, all of which exist in this instance, the causes of action are clearly wanting in identity, and especially so, when the creation and existence of the latter agreement, on which one suit is founded, was a distruction, and abandonment of the first agreement on which the defeated action was alone founded.

2 Smith's Leading Cases, 932–3.

Secor v. Sturgis, 16 N. Y. 554–5.

Note b., 2 Sch. and Lef., p 11.

3 Am. and Eng., Ency. of Law, 890-1, §§ 58–9 notes.

Billingslea v. Harrell, 11 Ala. 775.

Authorities, *supra*.

The legal effect of the new agreement, in 1875, and afterwards, was the same as if the stock had been delivered to Gilmer by Morris, and then delivered back by Gilmer to Morris for the new and enlarged purposes of the new contracts.

Markham v. Jaudon, 41 N. Y. 235.

But, the position is taken, and insisted on, that the com-

plainant should have amended his first bill, so as to bring forward his whole case, and that not having done so, and the first presentation being found defective, this suit is barred.

There are a number of answers to this. One is, that the case was decided and dismissed in vacation, and hence there was no opportunity to amend.

The reply to this, perhaps, will be, that we ought to have confessed the demurrer and amended as soon as it was interposed. The answer to which is, that any such requirement would be manifestly absurd. A party is never required to waive his point by confessing the demurrer and amending. The plaintiff can always present his case as he pleases, and, if the defendant thinks it is insufficient, he can demur and demand judgment as to whether he is required to make further answer. If the plaintiff does not think the demurrer well taken, he has a right to the judgment of the court thereon. And when the judgment is rendered, that issue is *res adjudicata*. And the *res adjudicata* remains, and is in no way affected, whether a dismissal or amendment follows.

A dismissal formerly was the universal result. 101 U. S. 568. And even now many amendments cannot be allowed, "it being far better to require the complainant to begin anew." Shields v. Barrow, 17 How. 144.

Another answer to the position that we should have amended, is that, if the case had been dismissed on condition of no amendment being offered, the plaintiff would not be precluded from a new suit; for there is no rule or statute which requires such an offer, if extended, to be accepted; and as accepting such offer would not *avoid* the effects of the judgment on the point or issue decided, so a refusal to accept could, by no process of reasoning, be made the occasion of any expansion of the estoppel *beyond* the issue decided.

Non constat, it might have been thought, that so radical an amendment would make a new case, as defendant below

urged against the amendment actually made, and that it was "better to begin anew."

Birch v. Funk, 2 Met. (Ky.) 549.

Wells on *Res Adjudicata*, § 440.

In Londonderry v. Baker, 3 Giffard's Rep. 128, on demurrer sustained, leave was given to amend but not accepted, and the dismissal was absolute. On a new bill for relief as to same subject matter it was pleaded that the former dismissal was *res adjudicata*, but the plea was held bad, because "it does not aver that the allegations in support of the relief prayed by this bill are the same as the allegations in the former bill."

This decision was sustained and affirmed by the Court of Appeals in Chancery.

Londonderry v. Baker, 7 Jur. N. S. 811.

Ib., 652.

The same principle is directly approved in the case of Moss v. Anglo Egyptian Navigation Company, Law Rep. Chan. Appeal Cases, Vol. 1, pp. 113-14-15-16, in which Lord Cranworth approves of the common law rule, that when there are several grounds to which a decree of dismissal may be referred, it cannot be regarded as *res adjudicata* to a second suit involving one or more of the same points, "unless there be *no doubt* that the bill * was dismissed for want of equity on the ground" necessary to the second suit. That it is necessary to show, that the decree in the first suit "*must* have proceeded on the ground" fatal to the second suit. That in case of a plea, it would not be sufficient to show the former suit and the decree of dismissal, but that there would have to be "an averment of facts sufficient to show that the question raised in the second suit had been adjudicated upon in the first," and that "this is not only conformable to principle, but to authority." And that "this is not a technical rule at all, but it is one of substance."

The Supreme court of Mass. in 100 Mass. 412, and 99 Mass. 202-3, 496, and the Supreme court of Va. in 29 Gratt.

494, endorse the same views, exactly; and, indeed, it is impossible to assign any reason why the general rule, as to certainty in estoppels, should not apply as well to proceedings in equity as to those at common law.

Detrick v. Sharrar, 95 Pa. S, 526.

1 Idaho, 324; 1 Wy. Ter. 234.

In the case last cited it appears that leave to amend was refused in the first suit, yet the second bill was sustained.

It is next insisted by the appellant, that, though he demurred to the bill filed in the State court, because on its face it showed no recognition of the trust relation within six years, and though this demurrer, at his instance, was sustained, the bill in fact does contain such averments, and that the bill in the present case ought now to be held barred because of that fact. In other words, he insists that the cause of action is *identical* in both suits.

This makes it necessary to refer to what has already been said, as to what is a cause of action. The right of the plaintiff, and the duty of the defendant, called for a surrender of the stock, only after the payment of all the debts for which it was pledged.

And we have shown, by reference to schedule A, p. 383 of the transcript, that the debts were not discharged until the dividend of August 1, 1884, had been received; and, thus, that there was no *breach* of the bailment, and no right to demand a surrender of the stock, on the 7th of July, 1884, when the first suit was commenced.

If, then, the first bill as amended, be taken as avering a pledge in 1875 and afterwards for all debts, as averred in the present bill, no breach of the contract was shown, since Morris still had the right of retainer for the balance then due him, and no tender was made, and no money brought into court.

But, the bill in the State court did not contain any allegations, which, construed and read as they were read on the trial in the State court, as upon demurrer, with every matter of doubt resolved against the pleader, are in sub-

stance those of the present bill, in reference to matters transpiring in 1875, and afterwards.

It is well enough to bear in mind that, in construing pleadings on demurrer, that construction is adopted most unfavorable to the pleader, and that averments must consequently be clearly and unambiguously set forth, and they will not be aided by inferences, and if not so set forth are insufficient.

Stephen on Plead. (379) and note.
Duckworth v. Duckworth, 35 Ala. 74.
Story's Eq. Pl., § 242, *et seq.*
Bliss v. Anderson, 31 Ala. 612.
Jones v. Cowles, 26 Ala. 612.
Cockrell v. Gurley, 26 Ala 405.
State v. Robinson, 75 Ala. 363.

Construed by these rules, the third paragraph of the bill in the State court, which is the portion of the bill relied upon by appellant to support his views, what can be said to be distinctly stated? Tr. 18.

The first statement is, that orator suffered the stock "to remain with and in the possesion of said Morris, because its value was chiefly prospective, and because orator had confidence that the said Morris would account for and surrender the same whenever orator might call upon him to do so, and should pay to him, and to the firm of Josiah Morris & Co., of which said Morris was the leading member, all balances of money due to him and them by orator." Tr. 18.

There is no averment here, of any new contract with reference to the stock in 1875 and afterwards; there is no allegation of any contract, at any time; no averment of anything material, whatever. There is no statement that any balances were due, nor when they were due, nor that they had been paid, nor that Morris ever made any agreement respecting them and the stock, whatever. On the rules and authorities above referred to, this part of said paragraph was, upon demurrer, regarded as stating nothing material,

and, certainly, as not containing any averment of recognition on the part of Morris of the trust.

The paragraph proceeds: "That after the transfer to said Linn, orator did become, and *still is liable* to said Morris, and to said firm of Morris & Co., for various small sums of money, besides the balance due on account of interest to said Morris on account of the original purchase of said stock." Tr. 18.

Here is an averment, that, "after the transfer to Linn, orator became and is still liable for various sums of money;" but is it distinctly stated that orator became liable after 1871, or after 1872? Might it not have been the *next day* "after the transfer to said Linn?" And, on demurrer, construing it most strongly against the pleader, would it not be so read? And then, again, is it distinctly stated that said liabilities were for loans by Morris to orator on the faith of said stock? Is there a clear and unambiguous averment of contracts on the part of Morris, to accept and hold the stock as security for loans to within six years of the commencement of that suit?

On demurrer, the allegations would be regarded as fatally defective, and were so decided.

The paragraph proceeds: "That orator being a man of small means the stock in the hands of said Morris became and was a basis of credit for money."

When was this? After the said transfer to Linn, but not necessarily after 1871. With whom was it a basis of credit for money? Does it say, necessarily, with Morris? If so, what sort of contract was it the basis of? Could it be inferred that they were those alleged in the present bill? All this is wholly uncertain, left for inference and conjecture, which is certainly insufficient, and was so adjudged.

The demurrer confessed these averments of this paragraph, construed with every ambiguity resolved against the pleader; and, as thus construed, the court held that there was no averment "of any recognition on the defendant Morris' part, of any existing trust relationship between himself

and the complainant intermediate between the time of the original transaction and the filing of the bill." Tr. 27.

No one can say that this construction is not in full accordance with the rules for construing pleading. The construction was undoubtedly correct. The bill, then, was without the averments of the present bill, which show a novation of the contract in 1875, whereby the original contract or pledge of 1871 was, in effect, abandoned, and a new one made, pledging the stock to Morris for the same, as well as for other debts, due to other parties, and due from other parties.

Billingslea v. Harrell, 11 Ala. 775.

It is plain, therefore, that the *res adjudicata* of the first suit is no bar to the present bill, which, being founded on a new agreement, makes a new case, "for a new case it is, if founded on a new agreement."

See note *b*, 2 Sch. & Lefroy, p. 11, case before Lord Redesdale.

It is thus plain, that though the State court may have committed an error in holding that the statute of limitations would run against a pledgor, there was no error in holding that the bill before it did not contain clear, certain, and unambiguous averments of recognition from 1871 to 1884, as the present bill does.

No court, we think, can hold that the rights, obligations and duties shown by the first bill respecting the subject-matter in dispute, are the same as those disclosed by the present bill. And, therefore, the cause of action in the two suits are not identical.

It is also insisted by the appellant, on the authority of Corcoran v. C. Canal Co., 94 U. S. 741, and the kindred cases of Louis v. Brown Township, 109 U. S. 162, that, notwithstanding there were no allegations in the first bill of the matters now alleged as taking place in 1875 and afterwards, all the facts now alleged were proven in the first case; and that, as the court sometimes decrees between defendants without pleading, it might do so between plaintiff and de-

fendant without impropriety—and that such was done in this case.

The practice in equity of decreeing, in certain cases, so as to settle rights between co-defendants, is well explained in the case of Graham v. Railroad Co., 3 Wall. 711, and, indeed, it is nowhere better illustrated than in the case in 94 U. S., *supra*. Those cases, and the case in 5 Russell 45, and 2 Sch. & Lef. 718, referred to in the opinion and brief of counsel in 3 Wall., *supra*, show that the jurisdiction in those instances, is regulated by the pleadings between the plaintiffs and defendants, making it necessary to settle the defendants' rights between each other in order to settle the plaintiff's rights. The points thus decided are always raised by proper pleadings in the cause, and any person interested in having a decision in a particular way has the full right of adducing proofs to sustain the issue involving his right (2 Sch. & Lef. 710 and 718; 5 Russell, 62-3), and may be admitted as a co-complainant, or file a cross-bill, as his interest demands. But, in all such cases, "no decree can be properly made between co-defendants, founded upon matters not stated in the bill, nor in the litigation between the complainant and the defendants, or either of them."

Jones v. Grant, 10 Paige, 350.

Elliott v. Pell, 1 Paige, 263.

Barnes v. Chicago, &c., R. R. 122 U. S. 14.

The case in 94 U. S., *supra*, shows that the very point in issue in the second suit was directly in issue, on *proper pleadings* and between *proper parties*, in the first suit, and was decided so as to bind Corcoran.

These cases afford no color for the position that the pleadings in the cause do not regulate and define the issues, and that the issues do not prescribe and limit the *res judicata* of the judgment.

There is not the least expression in them in conflict with the principles of the opinion pronounced by the lower court in ruling on the plea of *res judicata*.

We admit that if the pleadings were general or indefinite,

anything within their scope might be alleged and proved to have been tried and decided. But this has no operation where the pleadings are in writing and defined.

Campbell v. Butts, 3 Comstock, 173.

Mondel v. Steele, 8 M. & W. 858.

Smith's Lead. Cases, vol. 2, part 2, p. 919.

Wells on Res Adjudicata, §§ 3, 201 and 299–300.

Packet Co. v. Sickles, 5 Wall. 592.

Aurora City v. West, p. 95.

The fact, then, that in the suit in the State court there may have been full evidence of all the matters in the present suit, and that counsel, supposing the demurrers would be overruled, or that an amendment would be allowed, submitted arguments based thereon, could not make the slightest difference as to enlarging, or narrowing the issues of the pleadings, or as to the effect of the judgment founded on them.

"The rule is explicit and absolute, that a party must recover in chancery, according *to the case made* by his bill, or not at all; *secundum allegata* as well as *probata*."

Bailey v. Ryder, 6 Seld. 370.

"No facts are properly in issue, unless charged in the bill, and no proof can be made of, or relief granted for facts not charged."

Duckworth v. Duckworth, 35 Ala. 74.

Piatt v. Vattier, 9 Pet. 413.

1 Green. Ev., § 528.

If the decree, then, had passed beyond the issues it would be limited by construction to the case made by the pleadings and the issue decided. "It is only matters involved in the issues that are regarded as *res adjudicata*."

Barnes v. Railway, 122 U. S. 14.

Graham v. R. R., 3 Wall. 710–11.

Wells on Res Adjudicata, §§ 227 and 252.

But, as we have seen, the record shows that the chancellor expressly bases his judgment upon the demurrer of the statute of limitations.

We confess, that if we had brought a new suit with substantially the same allegations as in the first, the *res adjudicata* of the first case, though rendered on demurrer to the bill or declaration, would have been fatal. See the case of Goodrich v. The City, 5 Wall., p. 573-4, in which such a plea was held good to the second action, but the court examined the pleadings to see whether or not the cases made were the same, saying: "Upon a careful examination of the declaration and of the libel, we are constrained to say, there is *no such difference in the cases which they respectively make* as can take this case out of the operation of the principles of *res adjudicata*." But, who can doubt that, if the second suit had disclosed allegations wanting in the first, and which would have obviated the demurrers upon which it was dismissed, the second suit would have been entertained.

"It must appear that upon the question of fact presented, the party has had a day in court in which he either did, or ought to have put it in issue." Hooker v. Hubbard, 102 Mass. 245.

The question of fact presented is, whether, after 1871, the parties had the transactions now averred in the bill. The question in the former case was, whether it was necessary to aver such facts, and not whether they were proved without averment.

If a plaintiff states a cause, which he thinks is good in law, and the defendant demurs, as he did in this instance, and issue is joined on the demurrer, and the suit is dismissed upon sustaining the demurrer, as was done here, it is plain the plaintiff has had no day in court, in which he did, or ought to have put in issue the facts of the subsequent acknowledgments and dealings which avoid the objection of the demurrer in the first case.

There was neither an opportunity to amend, nor any obligation to amend. We had the right to take the judgment of the court of last resort on the question of law raised on the demurrer, and to bring a new suit averring facts curing the objection made to the first pleading, or making a different case, as was done in this instance. The averments of the present bill showing entirely different contracts, to se-

cure debts not then (7th of July, 1884) paid, would hardly have been sufficiently germane to have been averred by amendment in the first suit. But, whether so, or not, the complainant below clearly had a right to accept the decision on the demurrer, and to await the payment of the debts for which the stock stood pledged under the contracts of 1875 and afterwards, and then to bring the present suit, which is founded on a cause of action as distinct as possible from that of the first suit. Every allegation in the first bill may be eliminated from that of the second, and we will have the transactions of 1875 and afterwards in this bill, constituting a perfect and different cause of action.

City of Los Angeles v. Mellus, 59 Cal. 452.

The counsel for appellant frequently in their argument refer to the opinions of the judges of the Supreme court of Alabama in the former suit, as if their *opinions* constituted the estoppel pleaded. It is the judgment of the court which creates the estoppel and not the opinions and reasoning of the judges.

Wells on *Res Adjudicata*, § 583.

Chaffe v. Morgan, 30 La. An. 1307.

Davidson v. Carroll, 23 La. An. 108.

Buckner v. Colcote, 28 Miss. 590.

Palmer v. Yarrington, 1 Ohio, S. 260.

There may be any number of judges, and they may all concur in a judgment, and, yet, each may give distinct and different reasons, which may be absurd or contradictory. The judges are not required to give any opinions, and thus they are not even records. A distinguished English judge once advised an eminent man, not bred to the law, who had been appointed to a judgeship, to be careful to render his decrees without opinions. And we think it would have been a wise practice in this instance.

In this case, it is the judgment of the lower court, and not of the Supreme court, that raises the estoppel, which has to be avoided in this suit.

The Supreme court was one of appellate powers only, as to the former suit. The appeal from the decree of dismissal did not even supersede the judgment of the lower court. It did not suspend the estoppel created, or right determined by that judgment.

If it had been a judgment of recovery, execution would regularly have proceeded on it; and suit could have been brought on it and a second recovery have been had, pending the appeal, if it had been a decree or judgment for money.

Planters' Bank v. Calvit, 41 Am. Dec. 616.

Freeman on Judgments, §§ 328, 433, 602.

The appeal, then, did not suspend or determine the estoppel of the judgment pending the appeal. And the concurrence of the Supreme court in the decree of the lower court, and its refusal to "*modify that decree*," certainly did not affect it. The decree of the Supreme court is simply one of affirmance.

"Come the parties, by attorneys, and the record and the matters therein assigned for error, being argued and submitted and duly examined and understood by the court, it is considered (i. e. adjudged) that in the record and proceedings of said chancery court there is no error. It is, therefore, considered that the *decree* of said chancery court be in all things affirmed." Tr. 267.

The Supreme court did not reverse the action of the lower court, dismissing the bill, but simply refused to modify that order. The response to the issue on appeal was, "there is no error;" and the final words in the opinion in response to the prayers of the appellant, were: "We decline to modify the *decree* of the chancellor." Tr. 34.

It is the chancellor's act, then, if any, that stands in our way, and not anything said, or done in the Supreme court. The act of the lower court, "derives no additional force from the affirmance on appeal, and is not satisfied, merged or extinguished."

Planters' Bank v. Calvit, (3 S. & M.) 41 Am. Dec. 616.

An appeal which only takes up the record for an inspec-

tion on the question of error *vel non*, is in the nature of a writ of error, and is a new suit. *Ib.*

Freeman on Judgments, §§ 328, 433, 602.

Bank of N. America v. Wheeler, 73 Am. Dec. 683.

And unless supersedeas bond be given does not effect judgment below. *Ib.*

Code of Ala., § 3622 (3950) *et seq.*

Brief of Appellant, p. 118.

As the appeal or writ of error failed to produce any modification of the decree of the lower court, of course, the decree of that court is the one which makes the estoppel.

It is, therefore, beyond the scope of legitimate argument to insist that the *opinions* of the two judges of the Supreme court of Alabama, who heard the appeal in the former case, as to law or facts, are matters of *res adjudicata* against us in this suit.

Counsel for appellants say, on page 108 of their argument, that, if the chancellor had not stated in his opinion that the objection of the statute of limitations was the ground of his dismissal of the bill, no one could be so wild as to say, the decree of general dismissal would not have been a complete bar, "because for all the record would then show, it *might* have been based upon the establishment of the first defense, namely, that appellee had never had a title."

Now, we do take exactly that position, and say it is good both by reason and authority, because for all the record would then show, the decree *might* have been because the chancellor thought there was an adequate remedy at law; or because no tender was shown; or because he thought the bill on its face was barred by limitations or staleness; all of which defenses are avoided in the present suit.

The rule being, as we have shown, that estoppels, whether at law or in equity, must be certain to every intent; and "that if upon the face of the record anything is left to conjecture as to what was necessarily involved and decided,

there is no estoppel in it when pleaded, and nothing conclusive when offered as evidence."

Russel v. Place, 94 U. S. 606.
Foster v. Busteed, 100 Mass. 412.
Chrisman v. Harman, 29 Gratt. 494.
Moss v. A. E. N. Co. Law R., 1 Chan. App. 113-4-5-6.

It is thus seen that the very base of the argument of the counsel on *res adjudicata* is a proposition at war with everything that has been held by the courts. We have met with no decision which warrants this idea of counsel that estoppels can be extended by *implication* to everything that might have been adjudged. On the contrary, we think all the authorities, when properly understood, hold, that for a prior judgment to be an estoppel in a second suit, the decree in the first "*must have proceeded*" on some ground fatal to the second, and that it is not sufficient to show that it may have been decided on such point.

And counsel not only assume erroneous fundamental propositions, but they undertake to fortify them by an appeal to authorities that afford them no support.

Thus, counsel appeal to Beloit v. Morgan, 7 Wall. 619, as an authority for the idea that the former judgment is not restrained to "the issues involved as determined by the pleadings" and limited to what was *actually decided* or *necessarily involved*, but extends to every possible matter which might have been brought forward by amendment or otherwise, and might thus have been adjudicated.

It is unnecessary for us to make any explanation of Beloit v. Morgan. We subscribe to everything there said, for it comes strictly within the "narrow view" taken of estoppels by the judges in The Duchess of Kingston's case, so often approved by this court, and, we may say, by all courts.

This court, in that case, simply allowed force to a matter involving validity of bonds, *directly* in issue and *decided* in the first suit between the same parties. The question of

the validity of the bonds was directly in issue in the first suit, which was on coupons from the same bonds; and, as no judgment could have been recovered by the plaintiff, except upon the finding or admission of the validity of the bonds, the recovery in the first suit was necessarily conclusive of the same point in the second suit, on other coupons from the same bonds. And counsel cite many other cases of this court as inappropriately as they cite the case of Beloit v. Morgan. But it is unnecessary to notice them in detail.

We do not deem it important to take any extended notice of the position of counsel, that a judgment sustaining a demurrer to a complainant's declaration or bill, vests the property in the subject matter of the suit in the defendant. The elementary authors in the law teach the opposite of this assertion. And the common practice of amending, or bringing a new suit with additional allegations, is wholly inconsistent with it.

And the corollary drawn by counsel from this false position, that a redemption from the contract of pledge of 1875 and afterwards, as decreed in this suit, infringes upon the *res adjudicata* of the former suit, on the assumption that by the defeat of that suit the property was vested in the defendant, falls with that assumption.

Counsel on page 119-20-1 of their argument press upon this court the idea, that because the Supreme court of Alabama after, or upon declaring that there was no error in the decree of the chancellor, and without in any way modifying or reversing his *decree*, *refused* to dismiss without prejudice, it thereby extended the natural and logical effect of the *res adjudicata* of the decree to a determination of the effect in this suit of evidence in that record; that is, outside of the issue of the pleading submitted and decided to be defective.

The idea re-stated, is this: there is an issue of law in the sufficiency of pleading submitted to the court, and on the record evidence supporting, or tending, we will say, to support a new, or perhaps an amended pleading. The court finds the pleading defective as not stating recognitions, and dismisses the action; and, on appeal, the Supreme court affirms the dismissal, and then it is asked to modify so as to dismiss without prejudice, but refuses to do so. Upon this, it is insisted that, on affirming a decision on a question of law arising on the sufficiency of pleading, the court has weighed and determined the effect of the evidence beyond the issues of the case, and that such argumentative deduction is a *res adjudicata* in this suit.

When the decree of the chancellor in the former suit was affirmed by the Supreme Court an opinion was published, which will be found on page 368 of the transcript.

The counsel for appellee filed a brief for a rehearing, which the counsel for appellant have made a part of the record in this case. It will be found on page 343 of the transcript. In that argument it will be seen that the attention of the Supreme Court was respectfully called to the impropriety of approving the chancellor's decree applying the statute of limitations to a case in which the court says in its opinion:

"The *testimony*, moreover, satisfies us that there was a tacit understanding that the stock was to stand good as a pledge for *future* advances to the father as well as for those to the son, *and the firms* o which he was a member * * The *facts* and *figures* in the case al harmonize with this presumption. They are entirely repugnant to the opposite conclusion."—See Tr. 343, 367, and 372.

On this application being filed, the court did not reverse their approval of the chancellor's decree, but altered their opinion by leaving out of it the matter above quoted.

See agreement of counsel, Tr. 367.

First opinion, Tr. 368-72-3.

Altered opinion, Tr. 27.

Afterwards, the same counsel for appellee suggested to the court, that the bill had been dismissed upon de-

murrer, and that it would not bar a new suit, but that on a new suit brought the counsel for the defendant might insist that the State court was mistaken in saying that the bill was defective in not alleging recognitions, and might turn to the third paragraph and claim that it averred ample recognitions. And that, if so held, the result might be, that the dismissal would stand in the first suit because allegations were not in the bill, and in the second because they were in it. And it was insisted that "Justice" could not contemplate such a contingency without horror. And the court was asked at least not to put us to that risk, but to dismiss "without prejudice."—Tr. 357 and 364-5.

The court refused this request, as it had a right to do, and to justify its act to posterity, said in an addendum to the opinion: "The ruling of the chancellor was on the testimony, and governed by it alone he reached the conclusion that the complainant's claim was barred by staleness. * * If the bill had been all the complainant could desire—if it had averred acts of recognition by Morris, so as to relieve the claim of the imputation of staleness—the proof in the present record would not sustain such averments. The claim under the proof would still be stale and barred on that account."—Tr. 34.

Now, the counsel for appellant insist that this weighing of the evidence upon *supposed* issues, is a *res adjudicata* that the evidence of this case is insufficient to establish the contract for future advances alleged inthis case.

But the counsel forget that the court, after a laborious investigation, had previously stated that "the testimony" convinced them that there was a "tacit understanding" as alleged in this case, and that "the facts and figures in the case all harmonize with this presumption." And that "they are entirely repugnant to the opposite conclusion."

Now, which of these conclusions ought an independent court to adopt? If views so opposite can be entertained by judges without producing any alteration in the decree, it is clear that the views are not *res adjudicata*, but only the decree.

It will be observed, too, that the very contingency so seriously called to the attention of the State Court, is at hand ; and that the only difficulty in the full support of this case, is in showing that the third paragraph of the bill in the State court was properly construed by that court.

If that paragraph is held by this court as averring the contracts of pledge in 1875, and afterwards, as averred and found in this suit, it is plain the *res adjudicata* of the former suit would defeat us here. But, we insist that though the want of liberality on the part of the State court has exposed us to this serious peril, it is not likely to prove fatal.

We have already endeavored to show that, by grammar and the proper legal construction of pleading upon demurrer, according to which this paragraph was read on the former trial, and according to which, of course, it must now be read by this court, it does not contain averments of recognition after 1871 to 1884, and that it clearly does not aver the new and enlarged contracts of pledge of 1875 and afterwards as avered in the bill in this case.

And in aid of this view we respectfully refer the court to the very good argument of counsel for appellant, page 94 to 99, showing that the appellant is estopped to read or parse the third paragraph of the bill, otherwise than as he and the court, at his instance, did on the former hearing. That argument is commended as sound in its application to them in this instance. But it has none in its proposed application to us. A plaintiff may amend himself out of court.

Shields v. Barrow, 17 How. 143.

When an amendment is made it is regarded as incorporated in the original bill—and if it erases or strikes out parts of the original bill, of course such parts are useless incumbrances.

Ib. 144.

It will be observed that the counsel for appellant reproduce in their argument the proceedings in the former suit which the amendment obliterated, as if the case was tried on the matter thus struck out.

Counsel for appellant insist that they, by presumption, waived their demurrers in the former trial; and they cite us to the case of Daughdrill v. Helms, 53 Ala. 65, and other authorities on page 90 of their argument.

In the case in 53 Ala., the demurrer the court speaks of is plainly the one for want of a foot note to the bill. A defendant is not bound to answer any part of a bill unless it is specified in a foot note.—Code of Ala. 812, Rule 11.

It is evident a party waives such a defense by answering and going into the trial.

The question is not considered in 53 Ala., but an authority is there referred to, Chapman v. Hamilton, 19 Ala. 121, which shows the reason and extent of this rule. There the demurrer was for want of parties, and on the face of the bill it was good, but the defendant, instead of demurring alone, answered also, and in his answer showed that all proper parties were before the court. "There can be no good reason (in such case) why the complainant shall be required to amend his bill, or that it should be dismissed." The same idea is expressed in Cavender v. Cavender, 114 U. S. 464, and Greenleaf v. Birth, 5 Pet. 132.

In Youngblood v. Youngblood, 54 Ala. 486, the submission was "on bill and answer, pleading and proofs." In the answer was incorporated a demurrer, and the court held that a decree granting relief, *ex necessitate* overruled the demurrer, though the record was silent. And here, if the decree in the State court had been for the complainant, the defendant could have insisted, though the record had been silent, that his demurrers had been improperly overruled. And, *co converso*, if the decree was for the defendant, where is the consistency in saying the demurrers could not have been been the occasion of the decree?

But, there are two further answers to this idea—one, that the chancellor puts his decree on the demurrer of the statute of limitations. The other, that the decree can stand on nothing else.

In conclusion, on the subject of *res adjudicata*, there is no doubt about the law. The rules expressed in the responses to the judges in The Duchess of Kingston's case must govern and do govern this case, because this court has made them its own. The only difficulty arises in the application.

If the trial had been had on the demurrer alone, of course, there would be no difficulty. No ground of that demurrer would be in the way of this suit.

The question then is, shall the strictness of the rule of estoppel be impaired by a matter within the control of the defendant in an action? It was not the plaintiff's fault that the defendant incorporated his demurrers in his answer The law, as we have seen, forced the trial on all the issues at once. If any confusion as to what the judgment rests on has arisen from this fact, it cannot be laid at the appellee's door, and it does not relieve the party relying on the estoppel from the *onus* of bringing himself strictly within the rule, and showing in his plea that the dismissal of the bill "must have proceeded on some ground fatal to the new suit."

And this, we respectfully submit, the plea does not do, as we have attempted to point out.

Issues of the Answer.

The question of *res adjudicata* arising on the plea being disposed of, there remains practically, but one matter of fact for consideration, viz:

Are the allegations of the bill, as to the novation of the original contract in 1875, and afterwards, substantially made good by the evidence?

Before entering upon the discussion of that question, it may be well enough to allude to the effort of the appellant to show *in this case*, that the stock never belonged to either of the Gilmers—that it was a mere option to buy so much stock, extended to F. M. Gilmer, and that the option had never been so exercised as to give any one any right to the stock. As a basis for this position, he denies in his answer

and swears to it as a fact, "*that complainant ever became or was a subscriber to the capital stock of the Elyton Land Company for the said one hundred and twenty shares, or for any other shares in said company.*"—See answer, Tr. 44. Perhaps a sufficient reply to this denial, is the certified copy of the declaration filed for the incorporation of the Elyton Land Company, which is in evidence, and which shows the appellee to have been an original subscriber for said 120 shares, and that he acknowledged his subscription before the same officer as the appellant Morris.—Tr. 198.

The oath to the answer, it will be observed, is duly waived.—Tr. 8.

But, it is immaterial, whether it be true, or false, that the appellee was such subscriber, for the appellant repeatedly swears that in the very inception, it was agreed that F. M. Gilmer should have so many shares, and that "I agreed to carry it for him, but afterwards *he asked me to let it be put in the name of J. N. Gilmer, . . . and it was done.*" I agreed to carry the stock and allow him to put it in the name of J. N. Gilmer. . . I never regarded it as anybody's stock, but Frank Gilmer's."—See Morris' dep., Tr. 203, 220. And it appears that the stock was issued in the name of the appellee, and was transferred to Josiah Morris as a collateral security for the original cost of $6,000, which Morris paid under the agreement. Yet, after this, the appellant is unable to comprehend that J. N. Gilmer had any right to the stock, or that he owed any legal duty with respect thereto to him or to any one else, for that matter, though, shortly after the original pledge, the $6,000 was paid by sale of half the stock, and the same agreement was continued, with respect to the remaining 60 shares, for the balance of interest, which did not exceed five or six hundred dollars.—See Morris' dep., Tr. 131. This position is in marked contrast with that in the suit in the State court. In that case, the appellant insisted that the stock, though received from J. N. Gilmer really belonged to F. M. Gilmer.

And he never pretended to claim it, except by limitations. The following is an extract from his deposition in that case :

I consented that it (the stock) should be taken in name of J. N. Gilmer.—Tr. 223.

Q. You did receive this stock *bona fide* as collateral from somebody, did you not?

A. Yes, sir.—Tr. 238.

Q. You received the certificates of stock after they were issued from somebody *bona fide* as a collateral for something?

A. Yes, sir.

Q. Now, Mr. Morris, the $6,000, which was part of the debt for which they were originally pledged, was subsequently paid by the sale of half the stock?

A. Yes, sir.

Q. You did not consider that stock yours?

A. I did not consider it mine, no.—Tr. 239.

Again, in another part of the same deposition is this :

Q. State whether or not you ever held it for F. M. Gilmer?

A. I did.

Q. State what the agreement between you and Mr. F. M. Gilmer was?

A. The agreement between us was, that I held this stock with the privilege of selling it at any time * * for any debt that he, Gilmer & Donaldson, or Gilmer, Browder & Co., owed me, *or might owe me.*

Q. At what time was this Mr. Morris?

A. . . on the 30th or 31st October, 1871, and on or prior to the 4th January, 1873, * when I told him he would force me to sell the stock. * * *

(As the firm of Gilmer & Donaldson was not formed until 1875, it is evident the agreement was also after that date.)

Q. What agreement was made between you and Frank Gilmer in reference to moneys which might be advanced for the benefit of these firms?

A. He agreed with me that any amount that was due by him, by Gilmer, Browder & Co., F. M. Gilmer, and Gilmer & Donaldson was liable for what he owed me.

(This answer clearly was "that the stock was liable for all *they* owed me.")

Q. Did you advance money to these firms?

A. I did, &c.—Tr 209, 210

Q. Then, how can you say Mr. Morris, as you have said, that Mr. Gilmer agreed with you that that stock should be held by you as col-

lateral for any thing that he, or Gilmer & Donaldson, or Gilmer, Browder & Co., did owe, or *might owe?*

A. How could I say it?

Q. Yes, sir.

A. *It is the truth*, because I talked to Mr. Gilmer very frequently about it, threatening to sell it.—Tr. 224-5.

Q. You agreed to buy [pay?] this $6,000, and hold the stock as collateral?

A. Yes, I agreed to pay for the stock and carry it.

* * * * * *

Q. The transfers on the back of the stock was to perfect that agreement?

A. Yes, sir. * * *

Q. *You held the stock under that agreement until 1881?*

A. *Yes*, sir.—Tr. 223. * * *

These extracts are quite sufficient to show, amongst other things, the absurdity of the position, that Morris only extended an option to the Gilmers to buy the stock in question, and that the option was never exercised.

The appellee was an original subscriber for stock. Appellant, in advance of the organization of the company, to be sure of the influence of the father, agreed that the subscription should be made in the name of the son, and that he would pay for the stock and carry it in his name, and says, "the transfer on the back of the stock was to perfect that agreement."—Tr. 223.

It does not require a lawyer to determine, that the original pledge was a bailment, by the legal owner, J. N. Gilmer, to Josiah Morris. Or to discover that Morris is estopped in law and equity to deny the title of his bailor.

Cook on Law of Stockholders, § 457 and 467.
Markam v. Jaudon, 41 N. Y. 235.
Baker v. Drake, 66 N. Y. 518.
Palmtag v. Dantrick, 43 Am. Rep. 254.
King v. Richards, 6 Whart. 418.
Story on Bailments §§ 102 to 111 and 291.
Schouler on Bailments and Car. § 233.
Jones on Pledges, §§ 52 and 569.

We now return to the question, whether, after the origi-

nal pledge for the $6,000, there was any new contract entered into with respect to this stock? In determining this matter the appellee has no need to rely on any other evidence than that of the appellant. And the quotations above made from his deposition, are entirely sufficient to make out the case against him. We will, however, so supplement them, as to leave no shadow of doubt about the matter, if credence is given to what the appellant says, against his own interest. In the first place, let it be understood that appellee's first firm was that of Gilmer, Browder & Co.; that Gilmer & Donaldson succeeded this firm in 1875; that Donaldson died in 1876, and that J. N. Gilmer & Co. succeeded, then Gilmer & Clanton, then Gilmer & Merritt, who were doing business in 1884.

See accounts attached as exhibits to Morris' dep., Tr. 248 to 278; Dep. of J. N. Gilmer, Tr. 93.

The original pledge was of 120 shares for $6,000, the cost of the stock. This was Nov. 23d, 1871. Dep. of Morris, Tr. 203. F. M. Gilmer was the financial agent of appellee's several firms.—Morris' dep., Tr. 210. In December, 1871, the original transaction was altered by a sale of half the stock for $6,000, and a *new pledge* of the 60 shares for the interest due on the original outlay.—Morris' answer, Tr. 46; Morris' dep., Tr. 223.

The following are additional extracts from the deposition of Josiah Morris:

Q. Then you say Mr. Morris, that the agreement which you have referred to as having been made by F. M. Gilmer, whereby this stock was to stand as security to you, not only for its original subscription price but for everything which Gilmer, Browder & Co, F. M. Gilmer, and *Gilmer & Co.*, might then, or thereafter owe you was subsequent to this original agreement which you have just mentioned?

A. The transfer was subsequent to that agreement. * *

Q. You do not pretend to say that Mr. Gilmer made agreements or arrangements with you for pledging this stock as security for debts of a firm not then in existence?

A. No.

Q. Then, *these agreements were certainly subsequent to the formation of these several firms?* (The context shows that "these agreements" were

agreements pledging the stock for the debts of complainant's several firms).

A. Yes, sir.

Q. You did advance this $6,000 to pay for this stock and took the stock on assignment from J. N. Gilmer as security for the reimbursement of the $6,000 to you and the interest thereon?

A. Yes, sir. * * *

Q. And you did it in pursuance of a request made by him (F. M. Gilmer)?

A. Yes, sir. * *

Morris' Dep., Tr. 225.

* * * * * * * * * * *

Q. Well, then, Mr. Morris, in the original agreement or understanding which you had through F. M. Gilmer, or by F. M. Gilmer, to advance the amount to pay for the stock subscribed for in the name of J. N. Gilmer, you do not now pretend to say that there was anything that passed between you and F. M. Gilmer in reference to the debts which were contracted several years afterwards or at any time afterwards?

A. None.

Q. Then you do not pretend to say that in that original agreement or understanding there was anything said about the stock standing as security for debts of firms not then in existence, and which were formed years afterwards?

A. There was not. * * Tr. 226–7.

It thus appears, from the deposition of Morris, in the State court, that the original pledge only secured the cost of the stock, and that, somehow, afterwards, it got to be a security in Morris' hands for anything that F. M. Gilmer might owe him, and for any amount Gilmer, Browder & Co., Gilmer & Donaldson, or Gilmer & Co. owed, or *might owe.* We do not understand how this could occur, without some very plain, agreements, expressed or implied. And, as we have both the improbability of any such agreements being made in advance of the formation of firms, and Morris' positive statements that these agreements were after the several firms were formed, and as two of these firms were not formed until 1875, and 1876, we might safely conclude the discussion of the question in hand at this point. For, if Mr. Morris is credited for what he, over and over, declares to be the truth, there can be no sort of question about the fact, that, after the original pledge of the 60 shares in De-

cember, 1871, there were repeated renewals and extensions or novations of the contract, so as to make the stock stand for other debts, as well as continuing and future debts, and that dealings were had on the faith thereof to within a short time before the commencement of this suit.

But, Mr. Morris' deposition in the State court does not stand alone to prove this important fact. In his deposition in this case, after ample time for meditation, he says:

Q. "Was there ever any agreement or understanding that this stock in your hands was to be security to you, or to your firm, for any of the debts of F. M. Gilmer contracted after the sale of one-half of the stock to Linn?

A. I don't think there was any understanding at all; I don't remember any; frequently I talked with Mr. Frank Gilmer about raising money to take up the stock. I was willing to give it to him at any time, and I thought he did not want it, or would not take it, *because he thought it was not worth what he owed.*

Q. The original cost of the stock was $6,000.

A. Yes, sir.

Q. And you received $6,000 on the sale of half of it in 1871?

A. Yes, sir.

Q. The balance that was then due on the stock, was the interest upon the payment you had made for it up to the time of the receipt of the $6,000 received from Linn?

A. As far as the stock was concerned, that was all, *but he was largely in my debt on other accounts.*

Q. Well, the stock was not pledged to you for any other than that, was it?

A. *It was understood that I was not to deliver the stock to Mr. Gilmer at any time, unless he paid me all he owed me.*

Q. Then, it *was understood*, between you and Mr. Gilmer, that it would stand as security for such debts as he might owe you?

A. *No, it was not; I understood* that *I would not deliver it*, unless he paid me what he owed me, *and told him so;* I don't know what his understanding was.

Q. Did he object to that?

A. I don't remember that he did, or did not.

Q. Well, was there any understanding with reference to the other accounts of Gilmer, Browder & Co?

A. No, sir; there was no *special arrangement;* I frequently told Mr. Gilmer that he should not have the stock unless he paid me what he owed me, but there was not a time up to 1881 that I would not readily have given him the stock if he, *and all of them* had paid me what they

owed me; the stock was not worth as much as the amount *they* owed me, and was not up to 1881, worth near the amount *they* owed me.

Q. What do you mean by *all of them?*

A. I mean F. M. Gilmer, *Gilmer & Co.*, Gilmer, Browder & Co , Gilmer & Donaldson, and--*I can not remember all of them.*

Q. You mean, then, F. M. Gilmer and the accounts of the several firms in which J. N. Gilmer was engaged after the original transactions?

A. *In which F. M. Gilmer was concerned; I was considering the whole of them.* * *

Tr. 131-132.

Now, here is a plain admission, that the only balance due on the original pledge, was the interest, not exceeding five or six hundred dollars, and therefore there could be no excuse for withholding the stock, and appropriating it quietly, without notice, for so small a sum. When the witness sees, from the drift of the questions, the abyss he is thus approaching, be at once hedges, by stating, "but he was largely indebted to me on *other accounts.*" Well, what difference would that make, if there was no understanding that the stock was to stand as security? Confronted by this new difficulty, he says: "It was *understood*," &c. Then, when his new position is revealed to him, by a repetition of his answer in the form of a question, he takes it back, and says "No, it was not," but, "*I understood* that *I would not deliver it, unless he paid me what he owed me, and told him so;* I don't know what his understanding was." But I don't remember, says he, that he objected. Well, we think that, notwithstanding the special pleading and denials of the witness, a very clear *understanding* is here, again, made out, that the stock was to stand as a security for other debts. F. M. Gilmer was manager for all the firms, he was "concerned" in them, as the witness says; and the appellant was unwilling to give up the stock, unless all the debts of all the firms were paid, "and told him (Gilmer) so," and "don't remember that he did, or did not object." At any rate, the dealings went on, presumably on that basis.

Was there then a novation, or renewal of the pledge, after the original transaction of 1871? We have given Morris' *un-*

derstanding; we have given his solemn asseverations that there were agreements and understandings, from frequent talks with the manager of appellee's various firms, to the effect that the stock was to be a security for all that those firms owed, or *might owe*, and that "*these agreements*" were after the formation of these firms; and it is shown that one of these firms, Gilmer & Donaldson, was formed in 1875, and was dissolved in 1876, and that another, Gilmer & Co., commenced business in 1876 or 7, and did business with Morris until 1883, when the last indebtedness was paid, the other firms succeeding Gilmer & Co., though doing business with Morris, left no balances.

Then, it was shown that there was only $400 or $500 of the original debt, for which the stock was pledged, unpaid by the sale of half the stock to Linn, thus showing no reason for fear of payment on Morris' part, unless other debts were also secured by it.

We see Donaldson placing other collaterals (stocks too, as well as land) in Morris' hand to secure future advances to Gilmer & Donaldson - and a credit for some of this stock entered on Gilmer & Donaldson's account in 1880. We see Morris paying an execution in 1875 against the appellee, and charging the amount to his firm, as in course of business.

Now, we have the evidence of F. M. Gilmer, that, on the formation of the firm of Gilmer & Donaldson, he distinctly negotiated for credit on this stock, for this firm, with Morris. And J. N. Gilmer's evidence that F. M. Gilmer undertook to negotiate for credit with him, and that credit was extended to that firm, that checks were drawn without funds, on F. M. Gilmer's report that the transaction had been effected, and were paid. And both show that the same course of business was pursued as to the subsequent firms. Tr. 72, 79, 80, 82, 83, 90 to 98.

Again, in 1875, when the stock was levied on, F. M. Gilmer says he asked Morris to pay the execution, and have the stock transferred on the books of the company, and to

hold it for that debt, as well as any other debt of appellee. To this Morris agreed, and told F. M. Gilmer to send "Jimmie" up to see about it.—Tr. 74.

J. N. Gilmer says, upon being informed by his father of the conversation, he went up, and Morris confirmed it, and made the agreement.—Tr. 90.

And the accounts show that, though Morris took a transfer of the judgment he did not use the execution, or coercive power of the law, but charged the amount to appellee's firm of Gilmer & Donaldson, and that it has been paid in due course, by subsequent deposits.—Tr. 248.

Morris, too, in his deposition in this case, says, that in making his answer he put in it the statement, that the stock was transferred in 1875 to his name on the books of the company *with appellee's knowledge*, only upon the belief entertained by him that appellee's statement of an interview in 1875, with reference to having such transfer made, was true.—Tr. 122-3.

If the debt had not been paid under some agreement, the course of business would hardly have been as it thus appears to have been.

We may well rest the discussion of this point here. For, on this evidence, with nothing to contradict it, the finding of facts, by the lower court, shown in the opinion, Tr. 374, cannot be called in question, not only as a "fair," but as an inevitable conclusion.

Leaving, now, the discussion of the facts, we will refer to some points of law which we suppose will be urged by the appellant.

In the first place, it will likely be insisted that from 1875, when Morris for the first time took a transfer of the stock on the books of the company in his own name, he held the legal title, and that the pledge then would be assimilated to a mortgage, and the possession of the pledgee be regarded as that of a mortgagee after the law day, and, thus, as adverse to the pledgor or mortgagor, and, thus, that the statute

of limitations of six years, against the recovery of personal property held adversely, is a bar.

And, doubtless, several cases in Alabama will be referred to, as sustaining this view, and among them the opinion of the court in the case of Gilmer v. Morris, Tr. 368 and 27, and the case of Humphries v. Terrell, 1 Ala. 650, and Byrd v. McDaniel, 33 Ala. 18.

In this court, and on such questions, we are not bound to take, as our measure of right, the yard-stick of the State court, and especially so if its shortage is such as to shock common sense. And we will show that decisions sustaining any such ideas are wanting in every element which commands respect.

In the first place, there is not, we believe, a man in the whole world who conducts his affairs on the idea, that a holder of collaterals is a hostile, or adverse holder. Nor one, we believe, who would suppose, that collaterals would become the property of the holder, by limitations, before the maturity of the debts for which they were pledged, or during the continuance of the dealings founded upon the transaction. This, if true, is enough to show, that, if there be such decisions, there is inherent in them some fatal error, which must destroy their worth as precedents.

In the next place, the case of Humphries v. Terrell, 1 Ala. 650, and Byrd v. McDaniel, 33 Ala. 18, so far as they deal with legal principles, are correct enough—whether they were properly applied makes no difference. "Principles must be applied according to sound judgment in each case as it arises."—See Ryan v. New York Central R. R. Co., 91 Am. Dec. 53–4. Neither of these cases is any authority for the position, that limitations can ever run until there is an *adverse holding:* nor does either of them even discuss the relation of pledgor or pledgee, and, much less, decide that a pledgee ever holds adversely to the pledgor. In Coyle v. Wilkins, 57 Ala. 110, the distinction between the possession of a mortgagee, after the law day of the mortgage, and that of the mortgagor, is well considered, and settled; and the

case of Byrd v. McDaniel is referred to by the court, and shown to be an authority for the position, that the statute runs in favor of the possession of the mortgagee, *because it is adverse;* and does not run in favor of the mortgagor, *because it is not adverse.* In other words, that the statute can only run *when the possession is adverse.*

In the opinion in Byrd v. McDaniel, the case of Humphries v. Terrell is distinctly supported and approved, upon the express point, that "the possession of *the mortgagee*, without any recognition of his relation to the mortgagor, is adverse;" and the same opinion approves, to the fullest extent, the doctrine of Coyle v. Wilkins, and the books generally, that there is no running of the statute, *when the possession is not adverse.*

These cases, then, when properly understood, and read in the light of subsequent cases, are authorities for us, instead of being against us. The fact, that the judge delivering the opinion in Humphries v. Terrell, was not attentive, in his remarks, to the distinction between a pledge and a mortgage, or that the particular facts of that case, or of those in Byrd v. McDaniel, may have called for a different application of the principles of law announced, can not affect the application of the law to other cases.

Neither of those cases notices, or discusses the difference between the possession of a pledgee, and that of a mortgagee after the law day of the mortgage, which distinction we will notice below; and we submit that what the respective judges say in them, is no warrant for supposing that either of them entertained the idea, that the statute of limitations would ever silently run in favor of a possession which was permissive, and defeat a title which was being constantly recognized either expressly or impliedly. Those cases simply hold that a mortgagee's possession after the law day, *nothing appearing to the contrary*, is adverse, and with this doctrine we agree. It is, exactly, what is announced in Coyle v. Wilkins, 57 Ala. 110.

Our position in this case, is first, that this is not a mort-

gage, but a pledge; and second, that, if it was a mortgage in the strictest sense, the relation was constantly recognized expressly or impliedly—that the transaction was to cover future dealings, which went on to within a short time before the commencement of this suit, and that "each act done under, or in recognition of the trust, is a renewal of the obligations it imposes."

Whetstone v. Whetstone, 75 Ala. p. 502.

Perry on Trusts, § 863, and note.

"If a mortgagee has been in possession for a great length of time, but has acknowledged that his possession was as mortgagee, and therefore liable to redemption, a right of action accrues upon that acknowledgment." Kane v. Bloodgood, 11 Am. Dec. 430. If we have shown that this stock remained in Morris' hands under express agreements, as Morris repeatedly swears to, or even under a "tacit understanding," as the Supreme court expressly finds, "that the stock was to stand good as a pledge for future advances to the father, as well as for those to the son, and the firms of which he was a member," (Tr. 372) and show that these dealings went on from 1875 to 1883 and after, what difference does it make, so far as any plea of the statute of limitations is concerned, whether the transaction was a mortgage, or a pledge?

Who is there that does not know well enongh that a mortgagee's possession, under such circumstances, would not be adverse? Note to Miles v. Thorne, 99 Am. Dec. 389.

It is a reflection upon the intelligence of the court to argue any such proposition.

Chief Justice Marshall, in Kirk v. Smith, 9 Wheat. 288, says:

"One of these (rules of construction) which has been recognized in the courts of England, and in all others where the rules established in those courts have been adopted, is, that the possession, to give title, must be adversary. The word is not, indeed, to be found in the statute; but the plainest dictates of common justice require that it should be implied. It would shock that sense of right which must be felt equally by legislators and by judges, if a possession, which was permissive and

entirely consistent with the title of another, should silently bar that title. * * * To allow a different construction, would be to make the statute of limitations a statute for the encouragement of fraud—a statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such a construction."

The Supreme court of Alabama has often held that there is no room for the operation of the statute, until the holding becomes adverse.

Coyle v. Wilkins, 57 Ala. 110.
Elsberry v. Boykin, 65 Ala. 342.
The N. O. & S. R. R. v. Jones, 68 Ala. 55.
Blackwell v. Blackwell, 33 Ala. 57.
Colbert v. Daniel, 32 Ala. 329.
McCarthy v. McCarthy, 74 Ala. 546.
See also Minor's Institutes, vol. 2, p. 506.
1 Domat, Part 1, B. 3, T. VII, sec. 5, Art. XI.

Not considering for the present, the point, whether this was a pledge or a mortgage, let us first inquire what is *adverse possession?* This might be answered by reference to the above quotation from Judge Marshall, which shows, at least, that a possession which is permissive and consistent with the right of another, is not adverse. But, we will take a definition from Tyler on Ejectment, p. 874:

"No possession can be adverse, except the person in possession *holds for himself, to the exclusion of all others, and under a claim of title which is entirely antagonistic to that of the true owner.* The claim of title must be adverse to that of the claimant, and not in any manner subservient to the title of the latter."

An adverse possession, then, is a compound thing, involving both the corporeal act of holding, and a purpose or intent, of a certain character, in so doing. If the intent is *ostensibly* one way, the holding is referred to *that intent* and partakes of its nature; in the language of the books, "the intention guides the entry and fixes its character."—Tyler on Ejectment, 875. It is obvious that a *secret* purpose can never give character to outward acts, such as possession, so far at least as third persons are concerned.

"In testing a defense founded on possession, courts of justice direct their attention to the time during which it has continued, and *its character.* The latter respects its notoriety, the nature of the occupation,

and *especially the intention with which it is taken and continued.* * * * The *quo animo* a possession is taken or held furnishes the true test to its character. * * * Where it *commences* under acknowledgment of the right owner's estate, the possession will retain its original quality through any succession of occupants of the land; and will be presumed to be in subservience to the right interest."—Tyler on Ejectment, 860-1.

Apply these definitions to this case. In 1871, on the 23d of November, when Morris received the stock issued in the name of J. N. Gilmer under an agreement to pay for it and carry it for an indefinite time—and took a "transfer of the certificates to perfect that agreement," (Morris' Dep., Tr. 223) did he consider that stock his? Let him answer himself. "I did not consider it mine; no." Morris' deposition, Tr. 239.

When, and how, then, did Morris' possession, which was originally permissive and in subordination to appellee's title, become hostile? Did he ever give notice of any hostile purpose? No. Did he expressly claim the benefit of the pledge for other debts than the balance of interest of $400 or $500? He says, he told Mr. Gilmer, who was manager for appellee and concerned in his firms, that the stock was held for all other debts, thus showing an enlargement of the original pledge. Does Gilmer object to this? No.—(Dep. Tr. 131-2). Did Morris ever say anything to appellee about paying the debts and taking the stock? No.—(Dep. Tr. 131- 2).

Were the debts still held by Morris and payments received? Yes. J. N. Gilmer & Co.'s debt was paid in 1883. F. M. Gilmer's account extended to July, 1876, after which Morris persuaded him to go into bankruptcy. Dep., Tr. 242. Gilmer & Donaldson's account was credited in 1880 with over $900. And Gilmer & Clanton, and Gilmer & Merritt, who succeeded J. N. Gilmer & Co. and did business up to 1884, left no balance against them. The open account of the first firm, Gilmer, Browder & Co., is charged by Morris to account of Gilmer & Donaldson, (see account to Morris' dep., Tr. 258, 265), thus showing continuous and successive dealings. The payment entered in Gilmer & Donaldson's

account, on the 11th March, 1880, of $975.00, was from proceeds of collaterals deposited to secure the running account. Tr. 233. This credit was in less than four years after the last item in the account; and, being the proceeds of a collection of a collateral, "was a payment by the debtor just as truly as if he himself had, at the time of the indorsement (entering the credit) *handed* the money over with the express direction to make the indorsement (credit)." And thus would have removed any bar of limitations against the debt to that date.

Sornberger v. Lee, 45 Am. Rep. 107.

Brown v. Tyler, 8 Gray, 135.

Colebrooke on Col., Sec. 183, p. 236.

A subordinate and permissive possession retains its character:

"In all such cases," says our State Court, and it is the general doctrine of the world, "between the trustee and *cestui que trust* such intention" (of renouncing the trust) "must be known or communicated to the *cestui*, otherwise the property will be considered as remaining subject to the trust."

Murray v. Mason, 8 Port. 222-3.

Elsberry v. Boykin, 65 Ala. 342.

Pinkston v. Brewster, 14 Ala. 319.

Tyler on Eject. 876-7.

McCartney v. McCartney, 74 Ala. 553.

Bacon v. Rives, 106 U. S., p. 106-7.

Wood on Lim. p. 433, § 212.

To make out the limitations, then, it will have to be urged, in behalf of the appellant; first, that there was no agreement or understanding, express or implied, that the stock should stand as security for future advances; and, second, that the transfer of the stock in 1875, to Morris' name on the books of the company, changed the character of his holding and made him a mortgagee with possession presumptively adverse.

Neither of these propositions can be maintained. The facts establish the agreement for future advances. And the law characterizes the transaction as a pledge, and not a mortgage.

The first proposition has been already disposed of. The second, we will now discuss.

Chancellor Kent says:

"The mortgage and the pledge, or pawn of goods, seem generally to have been confounded in the books, and it was not until lately that this *just* discrimination has been attended to and explained."

Courtelou v. Lansing, 2 Cai , Cases, 200.

It is evident that, though many able expositions of the distinctions between a pledge and a mortgage, have been made during, and since Chancellor Kent's days, the just discrimination between them, occasionally, "has not been attended to."

"A pledge may be defined to be a delivery of personal property as a security for some debt or engagement. A mortgage of personalty, on the other hand, is a sale with the condition attached, that if the mortgagor performs some act, the sale shall be void. In a pledge, the title remains in the pledgor, while the pledgee has a special property in the thing pledged. In a mortgage the title passes to the mortgagee, subject to being revested in the mortgagor upon payment of the debt. In pledges, the thing pledged must be delivered to the pledgee. In mortgages, generally the possession of the thing mortgaged remains with the mortgagor. * * *

A mortgage of stock, however, is not often made, and unless there is a clear intent to the contrary, the courts will treat the transaction as a pledge, rather than a mortgage. In fact, it is difficult to ascertain from the cases, how shares of stock may be mortgaged, and a few early decisions, which held certain transactions to be mortgages, would, to-day, be held to be pledges. There are but few clear cases of a mortgage of stock to be found * * * Where * the certificate of stock is delivered to the creditor as security, it is evident that possession of the property is given to the creditor, but that the debtor still considers the stock to be his. Such a transaction is a pledge, and not a mortgage, and consequently since the giving of stock certificates as a security is almost invariably effected by a delivery of the certificates, a mortgage of stock may be said to be possible, *but not probable*, or *even sensible*. The delivery of a certificate of stock with a blank power of attorney, as collateral security, constitutes a pledge and not a mortgage, and the same rule applies even though an absolute transfer or registry is made on the corporate books."

Cook on Stock and Stockholders, §§ 463–4.

Jones on Pledges, §§ 1, 2, 3, 4, 5, 7, 8, 9, 151–3.

Story's Eq. Jur., §§ 1030–3.

Story on Bail, §§ 286-7, 345-8, 352.
Courtelou v. Lansing, 2 Cai., Cases, 200.
Schouler on Bailments, § 167-8.
Nabring v. Bank Mobile, 58 Ala. 204.
Wilson v. Little, 2 Comstock, 443.
Halliday v. Holgate, L. R. 3 Exch., 302.
Lucketts v. Townsend, 49 Am. Dec., 721, and notes.
Wood on Lim., p 47, n. 3.

The same sense of justice, which induced the courts to recognize an equity of redemption, after forfeiture of the absolute estate at law in the case of a mortgage, makes them all lean against construing any transaction a mortgage, rather than a pledge.

4 Kent's Com. 138-40.
Schoulder on Bail., § 168.
Jones on Pledges, §§ 1 to 14, 151-3.
Cook on Law of Stock, etc., § 464.

There is not a single author, so far as we are aware, who has written upon the subject, since stock certificates and the use of them as collateral became common, who has not distinctly stated it as a rule, deduced from the most recent and approved decisions, that the transfer of stock, on the books of the corporation, to a creditor, as security for a debt, is a pledge, and not a mortgage.

Nabring v. Bank Mobile, 58 Ala. 204.
Jones on Pledges, Secs. 9 and 151--2--3.
Schouler on Bail., Secs. 167--8, 194.
Cook on Law of Stock, etc., Secs. 463--4--5.
Brewster v. Hartley, 37 Cal. 13.
5 Waite's Actions and Defenses, 168.
Dykers v. Allen, 42 Am. Dec. 87, notes.
Wilson v. Little, 51 Am. Dec. 313, notes.
Dewey v. Bowman, 8 Cal., 145.
Story on Bail., Secs. 321--2--3.

Not only so, but one of the best, finds mortgages of stock so infrequent and difficult that he says, while they are perhaps possible, they are neither probable nor *sensible*. Cook

on Law of Stock, etc., §§ 463-4-5. And another of equal or greater authority, says :

"There is a qualification of the general distinction between a mortgage and a pledge that a mortgage is a transfer of title, while a pledge is a mere lien, *with respect to choses in action;* for in most cases these cannot be pledged without transferring the title. Thus, in a pledge of negotiable paper, the title necessarily passes by delivery of the paper if it does not require endorsement; or if it does require endorsement, then by delivery after such endorsement. To make a pledge an effectual security, it is necessary that the pledgee should have the legal title. The same is true in general as to other transfers of choses in action, such as transfers of corporate stocks. *A transfer of the title to such incorporeal property is generally an essential part of the delivery of it in pledge. An absolute transfer of such property as security for a debt is a pledge and not a mortgage.* The general property may be regarded as remaining in the debtor, though the legal title be transferred to the creditor. A transfer of such property by an assignment which is not in form or substance a mortgage will constitute a pledge of it. * * It is true that there may be a mortgage of such property; but, to constitute a mortgage of it, by putting the conveyance substantially in the form of a mortgage; that is, it must be a conveyance upon a condition or defeasance expressed in the instrument of conveyance, or by a separate instrument which would be construed as part of the conveyance. * * An assignment of a contract absolute in form, as collateral security, is a pledge rather than a mortgage of it. The fact that the title passes in form does not make the transaction a mortgage. A transfer of title is necessary in order that the creditor may have full control of the contract, and the means of promptly enforcing it."

Jones on Pledges, §§ 9, 152-3.

Nisbet v. Macon Bank, 4 Woods, C. C. 464.

Another of these authors, Mr. Schouler, takes it for granted that everybody, in these days, understands that a transfer of such choses in action as collateral for a debt, is a pledge, and only labors to show that it should also operate in that way *between the parties* while the transfer is being made on the books of the company; that the latter is necessary for the protection of the pledge against creditors of the pledgor.

Schouler on Bail., §§ 194-5-6-7.

So that, to say the transfer makes it a mortgage, is to say, there can be no pledge of any incorporeal or negotiable se-

curity, whatever, since the effectual delivery of possession can, in none of them, be accomplished without a transfer of the title in form. But, there is not a court in the world which, nor perhaps a man in the world who, has not treated such transactions as pledges—and no court more distinctly so than that of Alabama in the case of Nabring v. Bank of Mobile, 58 Ala. 204.

We may, then, conclude that the Supreme court of Alabama overlooked the distinctions, *supra*, and made a serious mistake in the law when they announced that a pledgee of stocks puts himself in the category of a *hostile* holder, *claiming exclusively for himself*, merely by perfecting the pledge by transferring the title on the books of the company, and that he is thus in position to acquire an absolute title to collaterals, before the maturity of the debt, or the cessation of the dealings for the security of which the pledge was made.

It will, no doubt, be said, that any such view of the law is unreasonable, and that the court did not say anything leading to such consequences. We agree, at once, that this is unreasonable, but, the court certainly does say the transaction was a mortgage, and did start the statute of limitations, as soon as the transfer was made, and puts no restriction, whatever, upon the conclusion, and finds the bar operative, and was unmindful of the fact that it had already found, as a fact, that there was a "tacit understanding that the stock was to stand good as *a pledge* for future advances * * to the son (J. N. Gilmer) and the firms of which he was a member." Tr. 372. So that the court not only does not limit its law so as not to cover a mortgagee or pledgee in possession for future advances, but holds the statute of limitations an answer to a case in which it is thus expressly found that the arrangement was for future advances, by which, of course, a pledgee, or mortgagee so called, might be entitled to collaterals in fee prior to, or during the advances thereon.

Such a ruling, of course, contains matter for its own condemnation. So far as this case is concerned it was *obiter*.

And so far as other cases are concerned no man or court can follow its teachings.

We may conclude, then, that the transaction involved in this suit is a pledge, and not a mortgage.

If the transaction is a pledge, we could leave out of consideration the fact that the novation of 1875 contemplated and embraced future dealings, and could well insist that, without such feature, this suit could well be sustained, so far as the defense of limitations and staleness are concerned.

This brings up the distinction between holding under a pledge, and under a mortgage after its law day and without any acknowledgment of the relation. In the case of a mortgage, there is "a passing of the property out and out," upon the happening of the condition—and, therefore, when possession is taken after the law day, the legal presumption (nothing appearing to the contrary) is that the possession is under the absolute legal title and therefore *adverse*. But, in the case of a pledge, "where by contract a deposit of goods is made a security for a debt," the possession is delivered, at the inception of the relation, under an express or implied agreement to hold for the bailor, who, even at law, can at any time by tendering the debt bring detinue, or trover for the pledge. The possession, thus, in the case of the pledge, starts out as a permissive and subordinate possession, and the contract provides no feature whereby the title and right of the pledge is to be enlarged so as to become absolute; in fact, the pledgee assumes the direct relation of a trustee, even at law, for the pledgor.—Angel on Lim., § 173-4. And, therefore, the possession, taking its character from the intent and purpose of the parties, at the inception of the dealings, remains as a permissive and subordinate possession, until either the trust is renounced and notice brought home to the *cestui*, by which an adverse holding is started, or there has been such "*great lapse of*

time," without recognition express or implied, as to raise a presumption against the continuance of the claim.

Note to Miles v. Thorne, 99 Am. Dec. 391-2.

There is no pretense that there was anything like renunciation or purchase in this case. By his silence, Morris led the pledgor to believe that the property was held subject to the terms of the trust, by and under which the possession was acquired—and there is, therefore, not the slightest pretext for saying, that the holding ever became hostile or adverse.

The question, then, remains, would staleness bar the claim, if the transaction had not embraced or contemplated, expressly, or impliedly, future dealings: in other words, if there had been no acknowledgment, whatever, of the trust relationship from 1875 or 1876, to the 20th day of September, 1886?

Let us, before undertaking this question, understand well the conditions of the supposition. The stock was pledged for $6.000, which was repaid by sale of half, and remainder pledged for interest, say $500. This in 1871. In 1875 we prove it was expressly pledged for $233.00, the amount of the execution levied on it. We leave out of view all express or implied contracts, whereby it was pledged for all the debts appellee's several firms did, or "*might owe.*" If there had been none such, would staleness have been a bar in eleven years?

We say not, by the law of every country, the *dicta* of Judges Stone and Somerville, to the contrary, notwithstanding.—Tr. 27 and 368.

No pure and simple pledge has been regarded as barred by *staleness*, from any such lapse of time, in any well considered case to be found.

We do not regard a case as well considered, or worthy of respect, which shows that the court was ignorant, or oblivious of the necessity of an *adverse holding* to start *a statute of limitations*, or which shows that the court did not understand the distinctions between a mortgage and a pledge. Nor are

we now considering the statute of limitations. That question has been disposed of. It is an absurdity to suppose that the statute could run, without an adverse holding, and it is no less absurd to hold that a transfer of collaterals for a debt is anything but a pledge, or that a pledgee's holding is adverse, or that it becomes so by any act, short of a renouncement of the relation, without notice to the pledgor. The question now is, at what period of time is a pure and simple pledge barred by lapse of time? The defense is an equitable one. It is not founded on statute law, but on a sound public policy, which has for its object the fixing of a time beyond which human transactions shall be regarded as closed. It is "what is called the doctrine of legal presumptions." "*If these legal presumptions require a longer period than statutory bars to acquire force and effect*, they are more general in their operation."

McArthur v. Carrie, 32 Ala. 92.

By common consent, twenty years has been agreed on as the period at which lapse of time *per se* bars all claims, which are not kept alive by acknowledgments express or implied.

Garrett v. Garrett, 69 Ala. 429.

McArthur v. Carrie, 32 Ala. 75.

Sims v. Aughtery, 4 Strob. Eq. 103.

"The common law prescribes to remedies no limitation whatever, except such as may arise after the lapse of twenty years from the presumption of satisfaction," &c.

Minor's Institutes, vol. 4, part 1, p. 502.

Wood on Lim., p. 2, note 1.

It is nothing but common sense, that, where the possession is not adverse, when the claim of the possessor is not *exclusively for himself*, but is expressly for another, as in the case of a pledge, the period of time necessary to obliterate the claim of the true owner, and to vest the title in the bailee, should be longer, and greatly longer, than the periods of statutory bars, which, in all cases, are founded on *adverse* possession and *exclusive* claim of right. And it betrays but

little regard for correct analogy or philosophy, to pretend to discover any similarity between the holding of a pledgee, which is expressly in behalf of the pledgor and subordinate to his right, and the presumptive hostile holding of a mortgagee after the law day. This distinction is well explained in Coyle v. Wilkins, 57 Ala. 110, in which it is shown, that the mortgagee in possession for ten years, without any acknowledgment of the relation, may plead successfully the statute of limitation, because his holding is, nothing appearing to the contrary, presumptively hostile. But, that, on the contrary, the possession of the mortgagor after the law day, which is permissive, and expressly or impliedly subordinate to the right of the mortgagee, would be no foundation whatever for any plea of statutory limitations, and, therefore, that nothing short of the presumption arising from twenty years peaceable and undisturbed possession would obliterate the claim of the mortgagee. If it were not for this plain distinction, between a *permissive* and a *hostile* holding, what sense would there be in saying, that the mortgagor should be barred from redemption in ten years, but that the mortgagee should not be barred from foreclosing short of twenty years? And if the same distinction is attended to, what sense is there in saying, that because a mortgagee may plead the limitations applicable to the character of the property held, a like period of staleness or limitations shall be *judicially* applied to the possession of a pledgee? Such blind application of legal rules reminds us of Dr. Sangrado's one specific for all diseases. Because the legislature has said, six years *adverse* possession of personal property shall bar any action for its recovery, the judges undertake to prescribe a like rule of six years possession by a trustee under an express trust, as that "*long lapse of time*," spoken of by Judge Story, from which "the right will be deemed to be extinguished, and the property will be held to belong absolutely to the pawnee." If Judge Story were alive, and should hear, in a modern court, such an application of his evident meaning, what would he think of the progress of the law

since his demise?—Story on Bailment, § 346. Judge Story did not cite any authority for this expression—those found in note 2 have been added by annotators, and will be subsequently discussed—but he did not cite the authorities shown in note 3 to the same section, and to note 6 to section 347, and, from these, it is clear that what he meant by "long lapse of time," in section 346, was the "great length of time" mentioned in the next section, and that they both referred to that period of time, now by common consent, judicially fixed at twenty years, "which covers human transactions with a mantle of repose."—Clarke v. Boorman, 18 Wall. 509.

We have not access to all the authors on the civil law cited by Judge Story; but we make a quotation, or two, from Domat: "A depositary, who *in that quality*, had possessed a thing for upwards of thirty years, would not have acquired the prescription." Note to Part 1, Book III, Title VII., § 4, Art. 14, referring to XI. Art. of § 5, which says: "Those who possess for others cannot prescribe what they possess in this manner. Thus the creditor who has a pawn * * cannot acquire by prescription * * For in order to prescribe, it is necessary to possess, and to possess as master; and in all these sorts of possession, it is the master who possesses by him who holds the thing in his hands. *And they who hold the things by these titles cannot, without knavery, pretend to be proprietors of them.*"

I Domat, Part 1, B. 3 Tit. VII, sec. v., Art. XI.

Ib., Tit. 1, sec. iv., Art. VII.

See, also, note to Powell on Mortgages, cited by Story, 1 Powell, 401.

All the authorities, too, cited by the annotators in note 2 to section 346 of Story on Bail, except one presently to be noticed, are directly in support of the proposition announced by the author in the same section, that neither limitations, nor prescription run against a pledge. And we might add any number to them.

The contrary authority is that of Waterman v. Brown, 31 Penn. St. 161. This decision is that the *statute of limitations*,

not staleness, ran in favor of a *pledgee*, because it ran in favor of a mortgagee in possession. This, itself, is enough to show that the judge delivering the opinion overlooked obvious distinctions, between the character of the possession of a mortgagee and of a pledgee, which destroy the worth of his decision. He decides that because the statute runs in favor of the *adverse* possession of a mortgagee, it shall run equally in favor of the *permissive and subordinate* possession of a pledgee! Or, if we take it that his decision is, that the possession of a pledgee is hostile and adverse, like that of a mortgagee, and, therefore, the statute runs in favor of each, will our respect for his learning and discernment be increased? This judge is, evidently, one of the class mentioned by Chancellor Kent, in Courtelou v. Lansing, 2 Cai. Cases, 200, who have not well attended to the just distinctions between mortgages and pledges. And he seems to have felt that there was a weakness about his position, for he appeals to the facts of the case as sustaining an *implied agreement* by the pledgor to abandon for the debt—thus placing his decision on a distinct ground, which may, of course, in proper cases be supported. So far as the first position is concerned, viz: that there was an implied agreement, on the part of the pledgor to abandon his pledge for the debt, it will be clear, that, whether the conclusion of the court, was, or was not justified by the facts, throws no light upon the question we are now discussing, which is, what length of time, *per se*, of peaceable and quiet enjoyment, by the pawnee, will bar the claim of the true owner?

On this question, we confidently say, that no author who, or case which, has observed the distinction between hostile and permissive possessions, can be found that puts this period at less than twenty years. Humphries v. Terrell, 1 Ala. 650, and Byrd v. McDaniel, 33 Ala. 18, raise questions under the statute of limitations, and not about lapse of time *per se*, and distinctly stand on the idea that the possession in those cases was that of mortgagees; and with the law, as declared on that basis, we can make no complaint.

The case of Waterman v. Brown, *supra*, we have seen also applies the statute of limitations, but, as we have also seen, to a case of permissive holding, and, of course, for that reason is an absurdity on its face.

We will hereafter discuss the aspect of Waterman v. Brown, in so far as it may be relied on as an authority to induce this court to infer, from the facts of this case, that J. N. Gilmer and Josiah Morris had an *implied agreement* between them, for the former to abandon his stock, for the debt for which it was pledged. If there was such an agreement, of course it ought to be enforced, but whether there was, or was not such an agreement, is altogether a different plea to that of *laches* and *limitations*, though, of course, lapse of time is a fact among others which may be properly used to make out an agreement.

Cook on Law of Stock, § 685, note 4.

There is another authority much relied on, which is as little applicable as the one we have been considering, and that is the case of Roberts v. Sykes, 30 Barb. (N. Y.) 173. Judge Somerville says, that, in this case, "It was held that a bill to redeem certain pledged stocks, which had been transferred on the books of the company, must be brought within ten years from the time the secured debt becomes due *by analogy no doubt to the statute of limitations governing claims to personal property in courts of law.*"—Tr. 30.

Now, the fact is, the court in that case founded its decision, whether rightly or wrongly, directly upon a *statute of limitations* of New York, *which we have not*, and which, says the court, limited relief "in case of the existence of a trust not cognizable by courts of law, *and in other cases not herein provided for*, to ten years after the cause of action accrued, and not after." The court applied this statute, and no analogy whatever, to the case, and thought the cause of action accrued on the maturity of the debt, and hence held the claim *barred by the statute.*

It seems that this case can not, with reason, be appealed to as any authority, whatever, against us on any point, and,

certainly, not in the way in which it is sought to be used. The court decided that a special statute precluded any discussion of the question involved in this case, whether the possession of a pledgee is adverse; and whether general statutes of limitation apply when the possession is not adverse, and whether the claim, which in that case was more than sixteen years old (the debt was due in 1840, and the bill was filed in December 1856), was barred at common law by the lapse of time? That case, and that of Waterman v. Brown, 31 Penn. St., 161, may also be otherwise distinguished from the case at bar, in the following particulars. In those cases, the credit was for a *definite time*, and was a *single transaction*, and the stock was worth *greatly less* than the debt for which it was pledged, while in this case the credit was for an *indefinite period*, which would at least require some demand or notice from the creditor for payment; then, again, the stock in this case was, at all times, *worth more* than the specified debt for which it was pledged, viz: the balance of interest of $400 or $500, and the execution debt levied upon it in 1875 of $233.00, and then, again, the transaction in this case did not originate, or stand, upon the ordinary basis of debtor and creditor; for, in its inception, it contemplated the purchase of old fields, the building of railroads, and the growth and development of a town to give great value to the stock, and the creditor wanted the debtor to "save the stock," and make something out of it and agreed and suggested that he should take it, and agreed to pay for it and carry it *indefinitely* "out of pure friendship."

Morris' Dep., Tr. 229.

Morris' Dep., Tr. 118.

And then, again, in this case, the parties were having continuous dealings all the time, and, if there was no express contract (as there clearly was) contemplating future dealings on the faith of the stock, there certainly was the implied agreement, or "tacit understanding" to that effect, as found by Judge Somerville (Tr. 372), and as testified to by Mr.

Morris, who says that that was his *understanding*, and that he so told F. M. Gilmer, who was the father of complainant and financial manager of his firms, and "concerned in them," and that he did not recollect that he objected.

Morris' Dep., Tr. 131.

Would any reasonable man, one disposed even to approximate justice, be inclined, in the face of these facts, to infer that there was any implied agreement, *mutual understanding*, (for an agreement contemplates mutuality) between appellee and Morris, that the stock should, as in the Pennsylvania case, be abandoned for the debt? If, yea, for what debt? Not, certainly, for the $400 of interest and the $233 execution debt. If the answer to this be, yea, then it assumes that the Gilmers were without common sense, and that Morris had lost all that "pure friendship" which impelled him to advance $6,000 originally on the stock; for the $233.00 was charged up in a running account on 12th July, 1875, and was paid by deposits from time to time, and the stock was certainly at all times worth greatly more than the balance of interest due. It is clearly nonsense to say, then, that the "tacit understanding" was to abandon for the $400 interest, of which payment had never been demanded.

But, will it be said that the mutual agreement, express or implied, was to abandon for the other debts of complainant's firms? Will any one venture to say that? Then, the answer is, that the evidence in the case, given by Morris, as well as by appellee, shows the fact not to be so. Morris, in his deposition in this case, shows that the only debt be held against Gilmer, Browder & Co., outside of an open account of $29.90, which is carried forward, on Nov. 1, 1876, against the new firm of Gilmer & Donaldson, (see accounts of these two firms, Tr. 258 and 265,) was the note produced and attached to his deposition, and that note has a credit entered on it the 23rd October, 1875, and was not "marked off" until March 5, 1884. (See entries on back of note, Tr. 136.) Then the account of Gilmer & Donaldson did not open with Morris until March 26, 1875, and con-

tinued until March 11, 1880, when a payment of $975.00 was made on it leaving a balance (exclusive of interest) of $1,412.53. Tr. 258. Then the account of J. N. Gilmer & Co., which opened on September 27, 1876, continued to May 31, 1883, when it was closed by note for $52.33, which was finally "dogged" out of appellee in October, 1883. Tr. 268 and 279. From these facts, it is simply impossible for any one fairly to say, that either appellee, or Morris, had any idea of the abandonment of the stock for these debts; for the one kept on paying, and the other insisting on payment down to October, 1883, when the stock was worth perhaps twenty thousand dollars, or more.

"Presumption is a judgment respecting the truth of one thing, by a consequence deduced from another thing. These consequences are founded upon what commonly and generally takes place."

1 Pothier on Obligations, 3 Am. Ed., 563.

Presumptions must, therefore, be reasonable.

It is absurd, therefore, to say there was a presumed abandonment of the stock for the $400 of interest; and it is a greater absurdity to suppose that it was abandoned for subsequent debts, which were being constantly paid, and for which it was not pledged, except upon the idea that it stood for future advances, which, itself, is *dynamite* to the theory of abandonment, as well as of staleness and limitations.

Assuming, then, that there was nothing after 1875, that passed between appellee, or any one for him, and Josiah Morris with reference to this stock, we think it may be considered as established:

1. That there was no contract, express or implied, whereby this stock was abandoned for any debt.

2. That neither limitation, nor prescription would be any bar to the appellee's right. Not limitations, because the possession was not adverse; nor prescription, by presumption from lapse of time, because twenty years had not elapsed without acknowledgement.

See authorities below.

There is a class of cases, we admit, in which the Court of Chancery refuses relief, unless the parties act promptly, but they are wholly unlike the present, as the slightest consideration will suffice to show. In such cases, it is not *time*, but *acquiescence* in acts requiring confirmation, which is inferred from delay after information, that constitutes the defense.—See Cook on Law of Stock and Stockholders, § 685 and note 4. A good example of the cases we refer to, is that of the Twin Lick Oil Co. v. Marbury, 91 U. S. 588. In that case, Marbury, being a director in a corporation, loaned it money and took a deed of trust on the property, and sold the property, and bought it. The bill was filed by the corporation, four years afterwards, to avoid the sale on account of the fiduciary character the defendant sustained. There was an undoubted option to avoid the sale, or to confirm it. We quote from the case:

"The officers, and probably all the stockholders, who were not numerous, knew of the sale as soon as it was made. They knew all the facts on which their right to avoid the contract depended. They not only refused to join the defendant in the purchase when the privilege was tendered them, but they generally refused to pay assessments on their shares already made, which might have paid this debt. The defendant then had a survey made of the ground leased to the corporation, the lease being the main thing he had acquired by the sale. When the lines were extended, the lease was found to embrace a well, then profitably worked by another company. Of this piece of good luck he availed himself, and by suit and compromise he obtained possession of that well. He put more of his money into it, and changed what had been a disastrous speculation by the company into a profitable business. With full knowledge of these facts, the appellant took no action until this suit was brought, nearly four years after the sale; and not until all hazard was over, and the defendant's skill, energy, and money had made his purchase profitable, was any claim or assertion of right in the property made by the corporation or stockholders. We think, both on authority and principle—a principle necessary to protect those who invest their capital and labor in enterprises useful but hazardous,—that we should hold that the plaintiff has delayed too long."

It is plain that cases of this class present an option to ratify, or to disaffirm an act. An election is necessary—one road, or the other must be taken; and nothing but

common justice requires that one shall not await subsequent events, and then make a choice according to the turn of fortune.

"It is well settled," says the same court, "that the option to avoid such a sale must be exercised within a reasonable time. This has never been held to be any determined number of days or years as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question. * * In fixing this period in any particular case, we are but little aided by the analogies of the statutes of limitation. * * The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party with whom that right is optional, is aware of the facts which give him that option are numerous. * * The more important are as follows: Badger v. Badger, 2 Wall. 87; Harwood v. R. R. Co., 17 *id.* 78; Marsh v. Whitman, 21 *id.* 178; Vigers v. Pike, 8 Cl. & Fin. 650; Wentworth v. Lloyd, 32 Beav. 467; Follasbee v. Kilbreth, 17 Ill. 522; Bliss v. Edmenson, 8 DeG. M. & G. 787; Prendergast v. Turton, 1 You. & Coll."

No decision could be fairer than this; but what anology has it to the one at bar? Yet, it is quoted as being similar.

Our case is, either that of a plain pledge for a debt of $400 and afterwards in 1875 for $233, which latter was sood psid; or of a pledge for continuous future dealings, for which the pledgee had also other securities; and the action is to make the bailee honestly account for the collaterals. Was there any sale of the collaterals, and an option presented to us to ratify, or disaffirm? No, there was no sale. Morris, it is true, affirmed positively in his examination in the State court that there was a sale in 1881, and in this case he says he claims that there was then a sale, but, in both depositions, on cross-examination, he distinctly said he could not tell whether the stock in question was among that sold, or that returned to him.—Morris dep. Tr. 238, 132. Be[illegible] there was a sale, we had no notice of it, and, of cours[illegible] not be presumed to be electing about a matter o[illegible] from our knowledge. Then, where is the analogy [illegible] can- the two cases? The stock was ours. The pres[illegible] concealed increase in value was the very inducement to [illegible] between await the event, and, of course, belonged t[illegible] pect of the [illegible] purchase to [illegible] us.—1 Domat.

p. 1, book 3; T. 1, sec. 4, art. 6. We either owed Morris specific debts, for which it was pledged, or it was pledged expressly or impliedly, with "other securities," to make good future advances, which were made for a number of years, and, in either event, Morris is the one, if anyone, who held options. He could foreclose at any time, by a sale at public auction, or by proceedings at law. He could stop his advances, when he chose. But, no law of any people that ever existed, could have authorized him, without notice or demand, and during the continuance of the dealings, to select a portion of the collaterals, and say (*to himself*), "I regarded this stock as mine from 1875, when I transferred it on the books of the company to my name."

To exempt any one from accountability under such circumstances, is simply to bring the law into contempt, for it would plainly "shock that natural sense of right" which is felt in common by the human race "if a possession, which was permissive and entirely consistent with the title of [illegible] other, should silently bar that title."—9 Wheat. 288. [illegible] civil law entertains the same ideas of such matters [illegible] Marshall did; for it says: "they who hold things [illegible] titles" (viz: those who possess for others) "[illegible] as Judge knavery, pretend to be proprietors of [illegible] gs by these happens to have a thing in his custody [illegible] not, without the right to possess as master, cannot [illegible] em." "He who and make to himself another title [illegible], which he has not udice of the right of another person [illegible] change his condition, by Strahan, Cushing's Ed. [illegible] possession, to the prejnot prescribe against his [illegible] son."—1 Domat Civil Law

But, human nature is [illegible] 2227 and 8, p. 886. One can have us believe was [illegible] wn title.—Civil Code of La., 3480. prove, any idea of [illegible] not so bad as Mr. Morris would true to his true [illegible] his nature. He had not, as the facts ruptcy, and [illegible] claiming the stock in 1875. He remained signee, and [illegible]t, until after F. M. Gilmer went into bank- 1881, [illegible] two years had elapsed without suit by his as- the [illegible]d until the stock began to advance in value in [illegible] perhaps until the dividends commenced in 1883. And [illegible] the supposed opportunity and temptation presented

themselves, and overcame his scruples, and induced a decision to *sell* the sixty shares of the Gilmer stock, while he was *buying* 426 shares of the Powell stock. He, doubtless, all the while thought (though clearly wrong) that the stock was F. M. Gilmer's, and that his going into bankruptcy cut off his right (though wrong again), and that the assignee lost his, by the limitation of two years, and that he (Morris), consequently, might claim it. But, in 1875, no such suggestions could have presented themselves. He was then on good terms with both the Gilmers:—doing business daily with them;—and it is beyond all human credence to suppose that he could then have thought of appropriating the stock, held as it was. And the facts show that such an idea is wholly an after thought, and, consequently, as is generally the case, it does not agree with the contemporaneous events. Thus, before he had well formulated in his own mind, how matters should be made to agree with that idea, he stated distinctly, on cross-examination, that he held the stock under the original agreement until 1881; and so he did. But let us give his own words:

A. Yes, I agreed to pay for the stock and carry it. * *.

Q. The transfer on the stock was to perfect that agreement?

A. Yes, sir.

Q. Was any time specified as to how long you should carry the stock?

A. No, sir * * *. I could sell the stock whenever I saw fit.

Q. You did not sell it until 1881?

A. No, sir; I had it transferred to myself.

Q. You did not consider that a sale?

A. *No, sir; do not know whether it was a legal sale or not.*

Q. *You held the stock under that agreement until 188.?*

A. *Yes, sir. I sold that stock, and considered the matter settled in 1875,* because he owed me twice as much as the stock was worth. *I actually sold the stock in 1881.*

Q. Would you have been perfectly willing for him to have had the stock up to 1881, if he had paid you?

A. *Certainly.*

Q. *You held the stock until you sold it, under the agreement,* in 1881?

A. Yes, sir. Tr. 223.

Here, it is evident, Mr. Morris admits that he held the

stock under the pledge until 1881, when it was that he considered the matter settled in 1875. He had no such thought in 1875.

In speaking about his interview with Col. Troy, who was the attorney who had the stock levied on in 1875, Mr. Morris says, that without telling him the circumstances:

I said * * * it is my stock. I meant by that *they* owed me something.

Q. You did not mean that the stock was yours?

A. I meant that *they* owed me three times that much. * * I said I cannot let this stock remain in this kind of fix; and he said you have a perfect right to have it put in your own name, and I had it done.

Q. Did you know that you had the right to do that in 1871.

A. No, sir.

Q. You say you never knew you had the right to have that stock transferred?

A. Oh! excuse me; I take back that. *I mean the only way for me to secure the stock, to secure my debt, and keep execution from it was to have it transferred.*

Q. You then learned, for the first time, that the only way to make that safe and secure for you was to have it transferred?

A. Yes, sir.

Q. Was that the reason you had it done!

A. *That was the reason I had it done.* * * * Tr. 240.

Now, after this transfer was made, Morris charged the amount he had paid out on the execution, to Gilmer and Donaldson, and continued his dealings, as the accounts show, for years afterwards, precisely as he had done before. His conduct and his declarations, show that his purpose in making the transfer on the books of the company, was only to perfect the pledge; to make the stock secure; to secure his debt and keep other executions from it. His conduct is consistent with this idea; and it is wholly at war with his after thought, of considering all the debts of all the Gilmers *wiped out in* 1875, by the transfer of the stock.

Q. You stated that you considered the matter settled up in 1875, when you took that stock in your name?

A. I did consider the matter closed in 1875. * *

Q. If you considered that a sale in 1875, at what price did you consider it a sale?

A. I considered it a sale for the debt he owed me.

Q. At what price?

A. I suppose it was worth forty or thirty cents on the dollar; it was not worth half the debt.

Q. You did not consider it a sale at any specified price?

A. I considered it a sale at the price of what he owed me.

Q. When did you credit his account?

A. Marked it off. *These accounts have* all been charged off. * *

Q. Is there any credit on any of *these accounts* for the sale of that stock in 1875?

A. No, sir. * *

Q. Why did you not enter that credit, if you considered that a sale in 1875?

A. Because these accounts were marked off. * *

Q. When was that account charged off your books?

A. I do not remember.

Q. Can't you find out?

A. I think that the account was charged off in 1881.

Tr. 232.

Q. Did you consider the debts of all of them wiped out.

A. Yes, sir, by the sale of that stock. * * * *

Q. Did you not intend to give them the benefit of anything you might sell the stock for?

A. I do not think that entered my head more than to wipe out the debt.

Q. Yet it did not wipe it out?

A. Left a large balance.

Tr. 243.

Now, see how such statements conflict with the facts. No credit entered, on any account, for the stock. All accounts kept open and continued as before. The "charging off," Morris, when pushed for the date, puts in 1881, which would show no purpose of appropriating the stock until then, but even in that he is wrong, for J. N. Gilmer & Co.'s account was collected in full in 1883, (Tr. 279) and the note of Gilmer, Browder & Co., attached to Morris' deposition in this case, as an exhibit, was not marked paid until 1884. Tr. 136.

Gilmer & Donaldson's account has a credit on it in 1880 of $975, (Tr. 258,) and if it had been "charged off" when

Morris was examined as a witness in the State court, it would have appeared on the account itself, which is a copy of his books. We are asked to believe, that a banker, keeping regular books, considered all the debts, of certain customers, wiped out in 1875, by a sale of one of their collaterals, yet that large balances were left not wiped out. A sale of collaterals in 1875, for account of the pledgor, but no credit entered of proceeds, in a case in which accounts are admitted to have been regularly kept. The "marking off" of the accounts stated as a reason why cotemporaneous entries of credit were not given, while it appears, *by confession*, that the "marking off" did not occur until six years afterwards (if at all) during which time the accounts were kept open and current as to debits and credits as if nothing had happened ! ! !

To believe this is, simply, impossible. It is not so. Why did not the like course of conduct apply to other collaterals held for Gilmer and Donaldson's debts, but which were collected and applied regularly in 1880?—See Morris' dep. Tr. 233.

Mr. Morris was true to his trust, until he commenced buying the Powell stock in 1881, when, according to the evidence of D. S. Troy, (Tr. 150,) it was advancing rapidly in value, and then, and not till then, did he harbor the thought of turning his back upon his old friend Gilmer, (who was poor and no longer '*possessed influence*'), by depriving his son of what he had in effect given him, and confided to Morris' keeping. And then, he was ashamed to do it openly, by revealing his purpose. He quietly appropriated, without notice to the pledgor, part of the collaterals entrusted to his keeping, and asks us to give that sort of holding a *hostile* character, and, by a sort of *nunc pro tunc* entry, to date it from 1875 ! !

What had been the wrath, and judgment of David, had Nathan laid this case before him?

It is immaterial to us, however, when Morris *considered* the stock his, and the debts of all the Gilmers wiped out, by

a sale which never took place in fact. Having no notice of this secret resolve on his part, we had a right to suppose he held the stock as he received it.

Wood on Lim. 433, § 212.

And, as neither limitations, nor prescription short of twenty years, run against pledges, this action would not be barred by the interval between 1875 and the institution of this suit, had there been nothing to keep it alive beyond the novation of 1875.

Moses v. St. Paul, 67 Ala. 168–172.
Strong v. Strong, 6 Ala. 347.
Hancock v. Frank. Ins. Co., 114 Mass. 155.
Angel on Limitations, §§ 173–174.
Whelan v. Kinsley, 26 Ohio St. 134.
Wilkinson v. Verity, L. R. 6 C. P. 206.
7 Wait's Ac. & De., 241–2.
Murray v. Mason, 8 Port. 222.
Story on Bail, §§ 346–7–8.
Lay v. Lawson, 23 Ala. 387.
Jones on Pledges, §§ 581–3.
Provost v. Gratz, 6 Wheat. 481.
4 Kent Com. 138–40.
2 Kent Com. 582–3.
Jones v. Thurman, 5 Texas, 318.
Courtelou v. Lansing, 2 Cai. Cases, 200.
Coyle v. Wilkins, 57 Ala. 110.
Kirk v. Smith, 9 Wheat. 288.
Garrett v. Garrett, 69 Ala. 429.
McArthur v. Carrie, 32 Ala. 75.
Whetstone v. Whetstone, 75 Ala. 502.
Blackwell v. Blackwell, 33 Ala. 57.
Hughes v. Edwards, 9 Wheat. 498.
Joliet Iron Co. v. S. F. B. Co., 25 Am. Rep. 341.
1 Domat Civil Law by Strahan, Cushing's Ed. p. 679, § 1731, p. 886, §§ 2227–8; note to § 2209, p. 877.
1 Powell on Mortgages, Coventry's note, 401.
Kemp v. Westbrook, 1 Ves. 278.
Bacon v. Rives, 106 U. S., p. 106–7.
Perry on Trusts, § 863, and notes.
Wood on Lim., p 2, note 1.
Minor's Inst., Vol. 4, Part 1, p. 502.
Miles v. Thorne, 99 Am. Dec., note, p. 389.

But, if there is anything in this case certain it is, that Morris, and both the Gilmers, understood the stock was pledged for every advance made by Morris' firm during, and after 1875. Morris himself expressly swears that he held *under the original agreement until* 1881, which of course means as modified to embrace and cover subsequent advances. Shall we believe this sworn declaration? Suppose we do not. Does he not reiterate, over and over again, that the agreement covered all advances to the several firms? Does he not act on that idea? Did not his counsel make that proof by him?

Tr. 209–10.

Do not the Gilmers swear to the same in effect? And, if there was no express agreement, does not the law imply such agreement?

Schouler on Bail. § 257.

2 Kent. Com. 584.

Wood on Lim. 48, note.

And was it ever before supposed, or contended, that collaterals deposited, as this was, at the commencement of dealings, which were continuous, were irreclaimable on the cessation of business?

Authorities, *supra.*

Miles v. Thorne, 99 Am. Dec. note p. 389.

We need hardly cite authorities in reference to the rights and duties of the pledgee. There could be no hardship on him. He was at liberty, at any time, to quit advancing, and to have the collaterals applied according to law; but it would be outrageous for him to assume the right of appropriating collaterals, without notice of any such purpose, and then to plead limitations, or staleness.

Diller v. Brubaker, 91 Am. Dec. 177.
Conyngham's Appeal, 57 Penn St. 480.
Davis v. Funk, 80 Am. Dec. 519.
Wilson v. Little, 51 Am. Dec. 307.
Robinson v. Hurley, 79 Am. Dec. 495, and notes.
Bryson v. Rayner, 90 Am. Dec. 69.

Maryland Fire Ins. Co. v. Dalrymple, 89 Am. Dec. 779, and notes.
Nabring v. Bank Mobile, 53 Ala. 204.
Jones on Pledges, *passim*.
Story on Bailments, *passim*.
Angel on Lim., § 173–4.
Joliet I. Co. v. Scioto F. B. Co., 25 Am. Rep. 341.
Lucketts v. Townsend, 49 Am. Dec. 721, and notes.

Some authorities hold, that the pledgee is bound to hold the identical shares, others, that he is only bound always to keep on hand an equal amount of the same stock to answer the bailment. So, that Morris might have sold our stock without violating his trust, as he always reserved an abundance to meet our claim.

Nourse v. Prime, 8 Am. Dec. 606.
Cook on Stock & Stockholders, §§ 169, 70–71.
Schouler on Bail § 234.
Jones on Pledges, §§ 509–10–11.

But, there really was no sale in this case (Tr. 132 and 238), and it would make no difference if there had been, as we had no notice of any such act.

The appellant has examined a number of witnesses to prove, that, after the sale of half the stock in 1871, at par to Linn, for $6,000.00, which paid the original cost of the 120 shares and left only a balance of a few hundred dollars due, the stock depreciated greatly in value. This is entirely unimportant in any aspect of the case. The rights and duties of a pledgee do not vary with the rise or fall of the collaterals in hand. The civil law says, without making any distinction on *values*, that it is "knavery to pretend to be the proprietor" of a thing pledged, and that it is a kind of "theft" in the creditor to use a pawn against the will of the owner—and that augmentations of the pledge arising from accident, or otherwise, belong to, and that depreciations and losses fall alone upon the pledgor.

1 Domat Civil Law, by Strahan, Cushing's Ed., p. 678, §§ 1726–1727 and 1730; and p. 886, § 2227.

And we know of no common-law authority that makes duty, in matters of trust, hinge on the magnitude of the interest at stake.

It may be, though, that this evidence is only for the purpose of assisting in the drawing of a presumption, that the complainant abandoned for the debt. We have discussed that matter already, and we do not think that, if this evidence is put in the scale with all else tending in that way, any man can draw the conclusion that there was any such purpose.

Unless there was a novation of the original pledge of 1871, the only debt against the stock was interest amounting to about $400, and the stock at its lowest was worth three times this. But if there was a novation, as there certainly was in 1875, the transaction became a continuing one—the debts were current and constantly changing, by the effect of debits and credits—and, hence, there is no basis for any idea of abandonment whatever.

This evidence, then, is of no value in the case.

It is insisted by the appellant, that, in the case of a pledge of stock and its rise in value, the pledgee has an equity to the increase; that it would be monstrous to give a man his property, in such cases. Would it not be monstrous, on the other hand—would it not hold out a lureing bait to weak persons—to say to pledgees: "If the stock goes down, you can be honest, and return the thing, but if it goes up, return the value at the date of an alleged conversion." The law is this: It is the duty of the pledgee to return, in all cases, the identical thing received. In the case of stocks, an equal amount of the same stock is held sufficient. All losses fall on the pledgor, all dividends and increase in value belong to him. If the pledgee acts improperly and sells the stock, the law gives the pledgor an option to ratify the sale and take the proceeds, or to sue for damages for the conversion, or to compel a specific execution of the contract by having an equal amount of the stock returned.

The cases cited by the counsel for the appellant in this

case, of Wood v. Hayes, 15 Gray, 376, and Lacey v. Hill, L. R., 8 Ch. App. 921, and others, in their argument, were proceedings for damages; and the rules laid down in them are correct. They have no application, however, to this case which is for the stock and dividends. Upon the repudiation of the trust, Morris had notice, at once, that the complainant demanded the stock. There was no delay to await the event and then to choose between the stock and its value. Nor was there ever a sale of the stock in this case. That pretense is shown to be untrue by Morris' testimony.

Tr. 238 and 132.

And this court will not presume a fact to exist contrary to duty, and contrary to the evidence of the only witness who could know the fact. The pledge in contemplation of law has remained all the while, and still remains in Morris' hands.

Nourse v. Prime, 8 Am. Dec. 606.

Nourse v. Prime, 11 Am. Dec. 403.

Jones on Pledges, § 509, and notes.

Cook on Stock, &c., §§ 469 and 475.

Robinson v. Hurley, 79 Am. Dec., note, p. 503.

Bryan v. Baldwin, 52 N. Y. 232.

Bryson v. Rayner, 90 Am. Dec. 69.

Diller v. Brubaker, 91 Am. Dec. 177.

Davis v. Funk, 80 Am. Dec. 521, n.

Lucketts v. Townsend, 49 *Ib.* 737, notes.

And would it not be monstrous indeed to allow a trustee as he was, and is, to pocket the dividends and increased value of the trust, and give us the value in 1881, when he pretended to sell, or even in 1884, when he repudiated the trust? The appellee elected at once to repudiate the pretended sale, and in a way to bind himself against the ratification afterwards of the unlawful sale if one had taken place. Bringing suit for the stock, though ineffectual for any cause, as want of jurisdiction, is an election. So is any other act or word showing a confirmation or repudiation.

Bish. on Con. § 808.

Bryan v. Baldwin, 52 N. Y. 235.
6 Am. and Eng. Eq. of Law, 247, N. 1, ib. 250, N. 2-3.
Neild v. Burton, 49 Mich. 53.

Does honesty ever oppress any man? The stock is ours, the holder knows it is, and that he is a trustee in possession. How, then, is it harsh, hard, monstrous, or in any way inequitable, to make him surrender what in conscience he cannot claim or hold? If courts permitted such conduct in trustees, what man of weak parts would deal fairly with a trust?

The duty to re-deliver the stock pledged is a primary obligation.

Cook on Stock, etc., § 471.
Lucketts v. Townsend, 49 Am. Dec. 735.
Diller v. Brubaker, 91 Am. Dec. 177.

And the right to redeem is an absolute privilege.
Jones on Pledges, §§ 552 to 561.
Cook on Stock, Etc., § 475.
Schouler on Bailments, §§ 250, 261.
Bryson v. Rayner, 90 Am. Dec. 69.

It is hardly necessary to insist to this court, that a construction, by a State court, of a contract of pledge, so as to make a pledgee a hostile holder and, therefore, as having the benefit of the silent operation of the statute of limitations while professing to hold under the pledgor, is not a construction of the statute of limitations, but a misconstruction of the commercial contract of pledge. And that this court is not bound upon any authority to administer such ideas, as fixed principles of justice.

Burgess v. Seligman, 107 U. S. 34, and note.

In conclusion, we beg to call attention to the clear and concise treatment of the facts in this case by judge Bruce, in his opinion shown on page 374, *et seq.*, of the transcript, and to his excellent opinion on overruling the plea of *res adjudicata* on page 36 of the transcript.

W. A. Gould
for appellee

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 1150.

JOSIAH MORRIS, Appellant,

vs.

JAMES N. GILMER, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

Brief and Argument for James N. Gilmer, by Henry C. Semple.

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Statement of the Case.

The appellee filed a bill to redeem certain stocks from a pledge, made in 1875 and afterwards, for past, present and future debts of the pledgor, and various firms, of which he was a member, succeeding each other, and doing a banking business with the pledgee, thereunder, until 1884. The bill contains the proper allegations of citizenship to give jurisdiction.

The appellant, with a knowledge of the situation and history of the party suing him, filed his plea in bar of the action, which being submitted upon its sufficiency was overruled. Thereupon the appellant filed his answer and the proofs were taken.

Before the actual trial on matters in the answer, but after

the trial on the merits as to the matters of the plea, (Alley v. Nott, 111 U. S. 472), the appellant attempted to raise a question of jurisdiction by a suggestion and motion, but the court denying his motion, the final trial was had, and resulted in a decree for the complainant below.

And to reverse these proceedings this appeal is taken.

ARGUMENT.

There can be no doubt, I feel confident, in asserting, that justice has been attained in this case as a result. The question, however, remains to be considered, whether the lower court has committed any plain mistakes in arriving at its judgment. For, since there is no assignment of errors as required by § 997 of Rev. Statutes, it is only plain errors the court is at liberty to notice.

Rule 21.

I. Jurisdiction.

So far as this question is concerned, having read the argument of associate counsel on this point, I am content with what is there said.

II. *Res Adjudicata.*

On this point, I must also refer to the brief of my associate for a general discussion of the subject, and will here simply reply to matters in the brief of opposing counsel.

The counsel for appellant, on pages 59–60 of their argument, state very fairly the question at issue between us.

I accept the first position there stated, as the one to be maintained, and as the true one, both upon authority and reason.

That position is this:

That the *res adjudicata* is confined to the issues involved, as determined by the pleadings.

This, counsel calls the "narrow view."

The second position, which they call the "broader view," is this:

That the principle extends not only to the questions of law and fact which were decided in the former suit, but also to the grounds of recovery which *might have been*, but which were not presented.

With this second position, with necessary explanations, and as properly understood, I also entirely agree. But, as the counsel for appellant intend this proposition, it is wholly untenable.

The truth and falsity of this second generalization of the law of *res adjudicata* by counsel, may be shown by two simple illustrations. Suppose, first, a declaration or bill filed, and a demurrer for staleness, or limitations, interposed and sustained.

Now, according to the proposition, as intended and understood by counsel, the subject-matter of that suit is disposed of forever, adversely to the plaintiff, because "he *might have presented*" matters avoiding the demurrer, in the bill or declaration, but failed to do so.

But, does not every lawyer know this is not true? And, that either an amendment may be offered in the same suit, or a new suit be brought with allegations to avoid the demurrer? The estoppel of the judgment sustaining the demurrer remains, and is the same, whether an amendment is offered, or a new suit is brought; and, as expressed by Mr. Gould, is, that, "the plaintiff can never afterwards maintain, against the same defendant or his privies, any similar or concurrent action, for the *same cause;* i. e., upon the *same grounds*, as were disclosed in the first declaration."

Gould Pl. Ch. IX, Part I, Sec. 44.

But, this estoppel is not in the way of the same declaration amended, or of a new suit, for the same right, avoiding

the demurer, by proper allegations. "For, in this case, the *merits* of the cause, *as disclosed in the second declaration*, were not decided in the first." *Ib.* § 45.

It is evident, here, that either Mr. Gould thoroughly misunderstood his business, or that the second proposition of counsel, as thus understood and applied, is fundamentally erroneous. But, as Mr. Gould is supported by this court, and, indeed, I may say, by the whole literature of the law, the error must be with counsel.

There is a sense, however, in which the proposition is entirely correct. Let us take, for the second illustration, the case of Beloit v. Morgan, 7 Wall. 619, so much relied upon for appellant. In that case, the plaintiff sued on certain coupons of bonds. A previous suit, on other coupons of the same series of bonds, had been brought, and judgment recovered thereon by the same plaintiff. In the second suit, the defendant sought to set up the invalidity of the bonds from which the coupons were cut, but the court held that the judgment of the former suit *necessarily* involved that question, and, being adjudged adversely to the defendant, was conclusive in the second suit.

No one in the world disputes that this judgment is correct. And it is not only correct, but it is in entire agreement with the first proposition of counsel, called the "narrow view," that the *res adjudicata* is confined to the issues involved, as determined by the pleadings.

The plaintiff in the first suit in declaring on coupons necessarily affirmed the validity of the bonds. And the defendant in answering must have confessed this allegation or denied it, and the judgment following for the plaintiff, of course settled that point against the defendant, and concluded it forever.

The point was thus directly in issue, and was adjudged against the defendant, and by all the authorities becomes

res adjudicata. The case of Aurora City v. West, 7 Wall. 96–7–8, illustrates the same principle exactly.

In a proper sense and application, then, both propositions of counsel are correct. The first as a universal truth; the second only in a qualified sense.

The confusion in the mind of counsel as to the second, arises from giving to the words "might have been presented," a loose and improper meaning.

Bigelow on Estoppel, 144–5.

These words certainly, have no application to what might be added by amendment to make a declaration or bill good against a demurrer.

The proper meaning is given in Aurora City v. West, 7 Wall., p. 102, referred to by Judge Bruce, Tr. p. 40, where they are limited to the "legitimate scope of the pleadings in the first suit."

If a demurrer is interposed for any cause to a declaration or bill, the issue developed is one of law, as to the legal sufficiency of the pleading.

And, in such case, the only application of counsels' second proposition, is that each party is conclusively presumed to have presented every available *argument* (ground of defense or recovery) to give shape to the conclusion and judgment of the court.

When the issue, however, is one *title*, as in the cases pleaded as estoppels in Beloit v. Morgan, and Aurora City v. West, 7 Wall. *supra*, the defendant was conclusively presumed to have presented in the first case every objection against recovery, within the legitimate scope of the pleadings in the first suit, and as the scope of the pleadings in those suits necessarily involved the same title set up in the second suits between the same parties, the estoppel was complete.

But, in both instances, the estoppels operate strictly within the limits of the first proposition, for in both it is limited "to the issues involved, as determined by the pleadings."

So that, the second proposition of counsel, when properly applied and understood, is but another form for the expression of the first. And when not limited, so as to operate within the terms of the first, is false.

And with this explanation every sound precedent cited by counsel can be reconciled with the truth of the first position announced, and with the ruling of the circuit court.

III. Res Adjudicata.—Continued.

The general law of *res adjudicata* is too well understood to require argument for its elucidation. Besides the authorities of this court cited in the brief of associate counsel, the whole doctrine may be gathered from the cases in the notes to Burlen v. Shannon, 96 Am. Dec. 741, and Lea v. Lea, ib. 772, many of which are taken from the Massachusetts Reports. There is no difference in recent and well considered cases as to what the true rule is.

For the purposes of the defense on this appeal, it is necessary to call attention to but one or two rules.

In the first place, the burden is on the party setting up an estoppel to bring himself within the precise terms of the law.

And the precise terms of the rule of *res adjudicata* are, that:

"To be a bar to future proceedings, it must appear that the former judgment *necessarily* involved the determination of the same fact, to prove or disprove which it is pleaded or introduced in evidence. It is not enough that the question was one of the issues in the former suit. It must appear to have been *precisely* determined."

96 Am. Dec. 741-2.

There is no distinction in the rule as applied to law courts, and courts of equity:

"To make the dismissal of a bill * a bar to a new bill, it must be an absolute decision upon the same points or matter."

96 Am. Dec. 779.

100 Mass. 409.

L. R. 1 Ch. App. 113-14-15.

If there is no means of determining upon which of several consistent grounds of defense the decree proceeded, "it can not be conclusive upon either," and cannot bar a new suit for the same right unless the first judgment must have rested on some ground fatal to the second suit.—*Ib.*

Lea v. Lea, 99 Mass. 496.

Foye v. Patch, 132 ib. 110-11.

Stapleton v. Dee, ib. 282.

The appellant must bring himself within the *precise* terms of these *precise* rules. Has he done so? He asks this court to reverse these rules, which I may say, all courts recognize, and to establish a new one for his benefit, by holding that a successful demurrer to a bill shall conclude by intendment every thing which might have been added by amendment, or might have been developed as to the subject matter by a new suit. ! ! !

It is hardly necessary for me to say that the merits of this case have no such foundation in ethics as to furnish an excuse for such a revolution of law, and disregard of precedents.

If there is any difficulty in gathering from the record the exact ground upon which the chancellor proceeded, arising from the mode of pleading in the former suit, it cannot be charged to the appellee, for he could not control the action of the appellant and prevent the presentation of the demurrers in the answer.

Not only does the appellant not show that the decree of dismissal "must have proceeded on some ground fatal to the new suit," but the record of the former suit develops the fact, both from the opinion of the Supreme court and of the chancellor, that the dismissal was on the demurrer of the statute of limitations, which is avoided in this suit by the averments and proof of new, enlarged, and different contracts of pledge in the year 1875 and afterwards, with continuous dealings thereunder to 1884.

The decree of the chancellor is a general dismissal, but his opinion—Transcript 26—shows that he proceeded on the defense of limitations, and the Supreme court states the same.—Tr. 31.

The appellant's plea is therefore not sustained, and the lower court properly held it insufficient.

The counsel very properly admit, on page 118 of their argument, that it is from the decree of the chancery court that the estoppel, if any, must arise, as the Supreme court simply refused to modify or alter that decree. "The same result is produced by the failure to take an appeal, or by the lapse of time for revising it by a writ of error."

"But whether a judgment actually rendered is made final and conclusive in one way or the other, the question still remains open as to what issue was decided."

Lea v. Lea, 96 Am. Dec. 777.

After this concession of counsel, it would seem inconsistent for them to argue, as they do elsewhere in their brief, that the *res adjudicata* against us extends to every thing found in the opinions of the distinguished judges of the Supreme court in the former suit. Suppose the two judges differed in their reasons for affirming, whose reason would constitute the estoppel? Suppose they state the same matters differently in their own opinions, how shall we proceed?

Now, the law does not require judges of the Supreme court to write opinions, and thus they do not when written form a part of the judgment roll. And they are nowhere held to be the source of the estoppel.

In Phelps v. Harris, 101 U. S. 370, it appeared that a question of title in a former suit, "was directly raised, and litigated by the parties," and the Supreme court affirmed the dismissal, and found in its opinion "that the defendant's title was perfect." But, as it was evident that the dismissal

[*Addendum*, to be read after second paragraph of 9th page.]

The objection of the statute of limitations was taken only by demurrer in the State court. The language is: "And respondent demurs to said bill because—1. The facts *alleged* show that the demand is stale. 2. That it is barred by the statute of limitations."—Tr. 22.

It is clearly shown that the Chancellor dismissed the bill because of the objection of the statute of limitations.—Tr. 26. His reasoning for so doing, we are not concerned with. That may be good, bad, or indifferent. Whatever he may have said or done in the way of making the decision is, at most, incidental matter. He may have thought he had a right to examine evidence in deciding a demurrer. But, that does not concern the *res adjudicata* of his actual decision, that the bill should be dismissed on *the objection of limitations.*

So, in the Supreme Court, the decision of the Chancellor is not altered or modified. The *issue* there was, error, *vel non*, in dismissing on limitations. The decision was, "no error." What the court may have said in its opinion, as merely *incidental* to rendering this decision, is, by all authority, not *res adjudicata.*

1 Am. & Eng. Ency of Law, 625, and notes.
Phelps v. Harris, 101 U. S. 370.
People v. Johnson, 38 N. Y. 63.
Campbell v. Consalus, 25 N. Y. 613.
Sweet v. Tuttle, 14 N. Y. 465.

was really because it was not a proper case for a court of equity, and that the Supreme court had entered upon the discussion for the purpose of showing that fact, it was held that this finding of the Supreme court was no *res adjudicata* of the title in the new suit.

So here, the decree of the chancellor is merely affirmed, and the reasoning of the court is addressed to posterity, and not to the litigants, and whether good or bad does not concern them except as to the judgment.

A writ of error is a new suit, and the single issue is error, *vel non*. And an appeal, which is only for revising and correcting errors, is of the same nature. And if the appeal does in no way supersede, or affect the judgment below while pending, it is difficult to understand how its final failure, by the judgment of "no error" on the single issue, can affect it. And certainly it makes no difference what reasons the judges may have had for the judgment, or whether they had any. The judgment follows the issue, and the issue and judgment prescribe and limit the *res adjudicata*.

Further, on the question of *res adjudicata*, I will only call attention to two or three cases cited by the appellant. One of these, is the case of Bissell v. Spring Valley Township, 124 U. S. 225, which the counsel for appellant assert is absolutely conclusive against the appellee. We think, on the contrary, that it holds in exact accordance with the "narrow view" of the doctrine counsel has attributed to us.

It must be first remarked, that on page 230 of the report, it is stated that the demurrer to the answer was "*sustained*" in the former suit. This is a mistake. In the former suit (110 U. S. 165), the demurrer was to a plea of *non est factum;* and "the demurrer was *overruled*, and the plaintiff, declining to reply, judgment was rendered for the defendant."

Now, every lawyer understands, that the failure to reply to a plea, is a waiver of every possible objection by a plaintiff

to the plea, as a failure to plead is a waiver of every defense.

In the former suit, the plea being *non est factum* to the bonds from which the coupons sued on were cut, and no defense being made to this plea after the demurrer was overruled, the judgment, of necessity, established the invalidity of the bonds, and, of course, was fatal to the second suit on other coupons from the same bonds.

This is exactly what was decided in Beloit v. Morgan, and in Aurora City v. West, reported in 7 Wallace, and in many other cases, and is precisely the doctrine of the Duchess of Kingston's case.

The point fatal to the second suit was directly in issue in the first suit, and was necessarily decided.

The remarks, then, of the court in this case (in 124 U. S.) must be construed with reference to the case in hand. And with refererce to that, they could not have been otherwise than as reported.

But, the court can but be amazed at being charged with having given currency, by the decision in that case, to the idea, that a judgment of 'no case stated,' on sustaining a demurrer to a bill, adjudicates that 'no case can be stated.'

The case of Henderson v. Henderson, 3 Hare, 100, is much relied on by counsel for appellant.

That case simply decides that when a cause of action has passed into judgment, it concludes every defense within the scope of the pleadings. This is a familiar principle, and not opposed to anything here asserted for the appellee.

In that case the defendant failed to present a defense to the first suit, which he might have presented within the legitimate scope of the pleadings, and on a suit by him to enjoin the decree and reduce the amount by his omitted item of defense, it was held that the former judgment had concluded him.

This is but the same idea enforced in Beloit v. Morgan, Aurora City v. West, and Bissell v. Spring Valley Township,

viz.: that an *issue* once made, and judgment passed on it, concludes everything which might, within the scope of the pleadings, have been brought forward to turn the beam of justice.

Counsel for appellant refer to a number of cases in this court, in which general expressions are used, to the effect that a dismissal of a bill, without words restrictive of the estoppel, will be construed to be on the merits, &c. The meaning of such expressions is simply this, that, after hearing, a judgment of dismissal will be referred to *an issue*, and be held to be conclusive thereof, rather than held to be a simple judgment of voluntary non-suit, constituting no estoppel.

These expressions, all of which I believe are *dicta*, are found in cases, none of which call in question the correctness of other decisions of this court, announcing the rule of *res adjudicata* as I have stated it.

It is evident that the omission of a judge, from whatever cause, to qualify his dismissal of a bill cannot extend the natural and logical scope of the decree. And that is not called in question in this case.

There was a number of issues before the Chancellor. He found one of them for the defendant and dismissed the bill. The question is, did he find one fatal to the maintenance of this suit? If he did, then the appellant, who pleads and asserts the fact, must show it to the satisfaction of the court. That is, he must show that the dismissal did, in fact, proceed, or must necessarily have proceeded, on some ground fatal to this suit. And this we insist he has not done.

IV.—ISSUES OF THE ANSWER.

So far as the proof of the facts alleged is concerned, I think the judge of the lower court drew, "the fair conclusion." The appellant proves every fact alleged in the bill—and he does not prove it once merely, but over and over. The particular points of the testimony relied on, have been

largely quoted and referred to in the brief of associate counsel, and will not be repeated here.

So that if the oath of appellant to his answer had not been waived, the evidence would be full to establish the conclusion of the lower court. Moreover, the appellant does not swear to anything in response to the bill which could militate against the conclusion of the judge, except when he swears to legal conclusions, which are contradicted by the facts set out in the same answer.

I am satisfied, however, that the court must hold that it is as proper to state in the note to the bill, what the defendant need not swear to, as it is to state what he must swear to, and, hence, that the waiver of oath to the answer is regular.

The counsel say that the waiver of oath cannot prevent the defendant from swearing to his answer. This is conceded, but the waiver destroys its effect as evidence.

Counsel insist that the decree of restitution in this case is monstrous. That because this stock has largely developed in the hands of the pledgor, the law does not warrant a decree for its return with its increase.

This idea is founded on two false assumptions. First, that there was a sale; and second, that we had notice, and did not elect to pursue the stock.

It is folly to assert that there was a sale of this stock. The law does not require a pledgee to keep the identical shares for return, but only a like number of shares of the same stock. If that is done, the presumption is that the shares retained are those duty required him to keep.

Nourse v. Prime, 11 Am. Dec. 416.

Nourse v. Prime, 8 Am. Dec. 609.

The appellant distinctly admitted on cross-examination that he could not tell whether the sixty shares of appellee's were included in the 300 shares issued to the New York parties, or in the certificate of 110 shares returned by the secretary to him.—Tr. 132-238.

Are we at liberty to *infer* a sale, as well as notice of it, under such circumstances, to aid a pledgee in appropriating the profits of his trust?

But counsel say that in 1884 Morris repudiated the trust. But did not appellant by bringing his ineffectual suit for redemption elect, beyond revocation to hold this stock?

6 Am. and Eng. Ency. of Law, 250 and ~~note~~ notes.

Ib. 254 and notes.

And this suit is but the consistent pursuit of the same rights. A repudiation of the trust by a pledgee does not convert the property and create a money demand, except at the election of the pledgor. A sale by a pledgee, and purchase at his own sale, leaves the pledge subject to the original trust unaltered.

Bryan v. Baldwin, 52 N. Y. 232

Robinson v. Hurley, 79 Am. Dec. 503, n.

Diller v. Brubaker, 91 Am. Dec. 177.

Lucketts v. Townsend, 49 Am. Dec. n. p. 737.

But here there is no evidence of any disposition of the stock. By just presumption, it is now, and all the while has remained, in the possession of the appellants, and, of course, unless we have manifested some election, or done some act contrary to the exercise of the right to claim the property, we have still the right to it, and its increments.

The cases of Hayward v. National Bank, 96 U. S. 611; Marsh v. Whitmore, 21 Wall. 179; Twin Lick Oil Co. v. Marbury, 91 U. S. 587, and other like cases, have no analogy to this case. In all of those, there was an election open to the party to ratify, or repudiate an act done of which he had notice; and nothing but common justice requires in such cases that the party shall act with reasonable promptness.

If after notice, and the lapse of a proper time, the act is not repudiated, it is held that the acquiescence gives rise to the presumption of approval. And, of course, after that, a suit founded on a repudiation comes too late; and such suits are sometimes called "stale." This, however, is an improper application of the term. The acquiescence or delay, merely, is not what defeats such a suit, but the presumption of ratification of the acts, resulting from want of objection within a proper time after notice.

Cook on Law of Stock, Etc., § 685, and note.

In this case there never has been a sale. No report of, or credit for a sale. And as soon as Morris denied the trust, the appellee's act claiming the stock was an election, to which he still adheres.

Neild v. Burton 49 Mich

In conclusion, the court is respectfully referred to the excellent opinions of Judge Bruce on the questions of law, and fact involved in this case, and which fully vindicate the judgment of the Circuit court.

Henry C. Semple
for appellee

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1868.

No. 1150.

JOSIAH MORRIS, Appellant,

vs.

JAMES N. GILMER, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

Reply argument of Henry C. Tompkins and Alexander T. London, for Appellant.

S. F. RICE,
D. S. TROY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 1150.

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JAMES N. GILMER, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

Reply argument for Appellant.

In the beginning of his argument, counsel for appellee makes a statement directly opposed, as we think, to the true facts of this case. He asserts that in 1870, the appellee was the owner by subscription, of 120 shares of the capital stock of the Elyton Land Co.

How, we ask, did appellee ever become the owner of 120 shares of stock by subscription? Putting the transaction in its most favorable light the appellee became entitled to be the owner of 120 shares of stock, on paying his subscription. It is nowhere pretended that appellee ever paid for the stock, and we submit that as against the corporation and appellant, he could never become the beneficial owner of it until he had paid the amount of his subscription.

We will briefly summarize the testimony contained in the record in reference to this original subscription, and ask the court to say, whether the statement referred to above, is not unfair and misleading.

In the suit in the State court, in his amended bill, appellee alleges that the privilege of taking 120 shares of the capital stock of the Elyton Land Company, on its organization, for $6,000 was offered to F. M. Gilmer, Jr., but he declined to take it and thereupon the shares were alloted to appellee, that appellant "agreed to pay the said six thousand dollars to said company as required, for orator, and to hold, until other arrangements could be made, the said stock as a security for repayment," and that afterwards appellant paid to the company the $6,000.

Amended Bill, State Court, par. 1, Record, pp. 165, 166.

In answer to the sixth interrogatory on his second examination in the State court, while doubting appellant's right to dictate or prescribe who should subscribe for the stock, he, says appellant, was the principal man, and witness applied to him "to allow J. N. Gilmer to subscribe for stock." And he says further, that the land forming the capital of the company was the same purchased by appellant.—Record, p. 190.

Appellee in the State court said, that "the amount of the stock so issued was $12,000.00 in one certificate for 120 shares; $6,000.00 was required to be paid for said stock." He then says that appellant agreed to advance the money required to pay for the stock upon the security of the certificate, and that he did advance this sum pursuant to the agreement.

Ans. to 1st Interrog., Dep. J. N. Gilmer.

Record, p. 181.

And yet on his cross-examination in that court, he testified as follows, "I did not know that any stock was to be subscribed for in my name until after the subscription. I think the subscription was made by Mr. Morris. My father informed me of it, shortly after the organization of the company."—Ans. 1st Cross Interrog. Dep. J. N. Gilmer, Record, p. 182.

And he testifies that this statement was true when made, and when his deposition was taken in this cause.—Record, pp. 102, 103.

In this cause he swears that he was a subscriber for 120 shares, which were to cost $6,000, and which he did not pay for, that appellant agreed to pay for it and hold the stock as collateral for its payment.

Record, p. 88.

On cross-examination he says the agreement was made for the stock with appellant by his father, and that he, appellee, knew nothing of his interest in the stock, until some time in the year 1871, which was necessarily after the organization of the company, because this took place December 20th, 1870.

Dep. J. N. Gilmer, Record, pp. 106, 107.

Declaration of Incorporation, Record, pp. 198, 199.

By the statutes of Alabama in force at the date of the declaration, the organization of the corporation was complete when the declaration was filed.

Code of 1867.

No certificate for the 120 shares was ever issued until November 23rd, 1871.

Exhibit A., Record, p. 195.

On the pages of his deposition, above referred to, will be found appellee's version of the original agreement, in reference to the stock. After saying that the agreement was made by his father, he says apellant informed him of it, and made this statement: "That the stock had been subscribed for in my name and for me, and it was intended for me, and that he had agreed to carry that stock until he could be compensated for its value."

F. M. Gilmer was insolvent from 1870 to 1878 when he went into bankruptcy. Record, p. 181.

Appellee has been continuously hard up and insolvent since 1871.

Record, pp. 99, 100, 105.

Each of these witnesses testify that he gave no note or other other obligation to pay for the stock.

The name of appellee appears as a subscriber for 120 shares on the declaration for the organization of the company.

A certificate for 120 shares of stock, was issued by the company in the name of appellee in 1870, but was issued and delivered to appellant, and immediately endorsed by appellee in blank. This certificate continued in appellant's possession and control until December, 1871, when 60 shares were sold for $6,000 and this certificate was surrendered, and a certificate for 60 shares in the name of appellee was issued and delivered by the company to appellant, and was in like manner endorsed by appellee in blank. After the sale of the 60 shares for $6,000 there still remained due and unpaid the interest on the $6,000, its original cost.

Conceding this to be the whole of the evidence, does it show any ownership of the stock by appellee.

Ownership of the capital stock of a corporation can not be, and is never acquired by mere subscription. The right to become the owner thereof, upon complying with certain conditions, one of which is in every case payment therefor, may be acquired, but the ownership is not.

Busey v. Hooper, 35 Md. 15.

The true facts of this case as shown above are, beyond doubt, that all the capital stock of the corporation was paid for by appellant, and all the shares were issued and delivered into his hands. Though the several certificates may have been made out in the names of appellee and others respectively, it is undeniable that appellant had paid the amounts subscribed, even before subscription, and took the certificates into his exclusive possession and control, even going so far, without surrendering such possession or control, as to require appellee and the other parties in whose hands certificates were made out, to endorse a transfer of the same in blank so as to give him full and absolute authority to sell and transfer the same. In 1870, then, appellee's right and only rgiht was to pay appellant for the

stock and take it. To call him the owner of the stock is a perversion of language; he had the right to become such owner upon paying appellant the purchase-price, but until that was paid he did not and could not own it. Suppose A agrees to sell B a bond, to be delivered on the payment one thousand dollars, B does not become the owner of such bond until he has paid for it and there has been a delivery either actual or constructive. The payment of a part does not change the title; nothing less than the payment of the whole can do that. In the case last put, suppose further that B had paid nine hundred and ninety dollars, still he would not be the owner, or even have a right to demand possession without paying or tendering the balance due. Even if he did pay or tender such balance and delivery was refused, his remedy would not be by a bill to redeem from a pledge, but his only remedy in such a case would be by an action at law to recover damages for the refusal to deliver, or if the bond had been sold by the vendor he might maintain trover for its conversion. But neither one of these actions could be maintained until the whole purchase-money had been either paid or tendered.

2 Benjamin on Sales, §§ 1164, and note 2, §§ 1173–80, 1305 and notes, §§ 1339–41.

Dustan v. McAndrew, 44 N. Y. 72.

We can see no distinction between the supposed case and the one at bar. Appellee never had a right to the possession of the certificates of stock, and at no time could he have acquired that right except by paying the purchase-price in full. The transaction has not a single element of a pledge in it. With the idea of a pledge there is inseparably connected ownership by the pledgor of the thing pledged. The distinction between the rights and remedies of one occupying such a relationship as that, and the rights and remedies of a vendee of personal property are broad and marked. The latter can never maintain such a suit as was brought by appellee in the court below. He has his rights and his remedies, but those rights are not such as are here

asserted and those remedies are not such as are here invoked.

Authorities *supra*.

This theory of the case is of course fatal to appellee, but we respectfully insist that it is the only theory consistent with the undisputed facts.

SECOND.

It is urged by appellee that this court should not consider the question of jurisdiction, because the evidence upon the removal of appellee to Tennessee and his object and purpose of removing was not relevant to any issue made by the pleadings. There can be no doubt that the evidence was relevant and proper, for evidence of domicil and evidence tending to show that the parties do not hold the citizenship necessary to give the court jurisdiction is an issue in every case before Federal courts. It is made an issue by law. In the very section of the Act of 1875, quoted by counsel for appellee, on page 6 of his brief, it is declared: If, "at any time after such suit is brought," it is made to appear the case is one that "does not *really and substantially* involve a suit or controversy properly within the jurisdiction of said Circuit Court * * * the said Circuit Court *shall* proceed no further therein, but *shall* dismiss the suit." Then it is clear that the issue is one the court cannot evade or pass. The statute is emphatic and declares in effect that whenever, before judgment, it shall appear, it matters not how it appears, that the case is not one properly cognizable before the court, the court *shall not* proceed with the trial, but *shall* dismiss the suit. What action, in such a case, the court shall take is also, we see, imperatively declared; it has no discretion, but is commanded, in such a case, not to do one thing, namely, proceed with the case; and, in equally imperative language, it is required to do another thing, namely, dismiss the suit. We cannot construe "shall not" and "shall" as vesting any discretion; they are not words importing discretion, but words of command. To say then

that when it is made to appear from the record, that the court below failed to do what the law imperatively commands it to do, this court has no power to review and revise its rulings is directly contrary to the spirit of the law, and in direct conflict with the principle established in *Hawes v. Oakland*, 104 U. S. 450, and other cases cited on this point in our former brief. See also *Cameron v. Hodges*, 127 U. S. 322, 325, in which it is said "This court has uniformly acted upon the principle that "in order to protect it-"self from collusive agreements between parties who wish "to litigate their controversies in the Federal courts, it "would, on its own motion, take the objection of the want "of jurisdiction in the Circuit Court, especially as regards "citizenship."

We respectfully submit that there is no more reason for the rule in cases in which there is a collusive agreement between the parties, than in cases in which one of the parties is attempting to practice a fraud on his adversary, as well as on the court.

There is no foundation for the assertion contained in appellee's brief, that appellant knew the facts relative to the nature of appellee's pretended change of domicile, at the time he filed his plea to the original bill. The evidence shows that, in the nature of things, he could not have known them until the facts were developed on the examination of the witnesses.

If there ever was a case in which there should be a strict and rigid enforcement of the provisions of the act of 1875, intended to prevent frauds on the jurisdiction of the Federal courts, this is one.

That this case is an attempt to have this court revise and overrule a decision of the Supreme Court of Alabama, made in a cause over which that court had complete and full jurisdiction, is apparent on almost every page of the brief of counsel for appellee. Even in the argument on this question of jurisdiction, counsel sneers at State courts, meaning of course, the courts of Alabama, as being "so blinded by delusion—and personal or local prejudice as to

render the attainment of justice in them impossible." If, when parties have once voluntarily submitted their cause to the decision of a competent court, because that decision is against them, they are to be told, that it is perfectly proper and right, to move from place to place, in order that other tribunals shall be given the power to revise and overrule the judgment against them, the administration of justice must inevitably be brought into disrepute and judgments lose all their sanctity.

We say that this is an attempt to have the Federal court review and overrule the decision of the Supreme Court of Alabama, rendered in a case between these same parties and involving the same property In that assertion we are abundantly sustained by the brief of appellee's counsel. It is fully recognized in that brief, that, if that decision is sustained by this court, the decision of the Circuit Court was wrong; so we find the decision of the Alabama court vigorously and almost savagely attacked.

Whatever may have been the rule before the passage of the act of 1875, we respectfully submit, that one, who removes his residence from one State to another for the declared purpose of bringing a suit in the Federal courts, that those courts may indirectly review the decisions of the courts of a State against him, and with the intention and expectation of returning to the State from which he moved in event he gains the suit, is not and cannot be a *bona fide* citizen of that other State. For men to undertake to use the Federal courts for such a purpose, is directly opposed to the spirit of the law, and the Federal courts should stamp such efforts to have them act as tribunals for the revision of the decision of State courts, with the seal of their unqualified and emphatic disapproval.

THIRD.

A great deal of ingenuity is displayed by counsel for appellee in endeavoring to show, that the bill in the State court, was dismissed on demurrer. We must confess, that, as that demurrer went to the foundation of appellee's rights

in that court, and in this, namely his title to the stock, we cannot fully appreciate the distinction which that fact would make in the effect of the judgment. When he comes to consider what he terms, "the philosophy upon which the rule (asserted by him) rests," namely, that a judgment on demurrer is not a bar, counsel says, that the contrary rule would be unjust, because at common law the effect would have been to put complainant finally out of court, he having no right to amend. But if the rule was as contended for by appellee, and the reason for it was as stated by him, the reason certainly no longer exists, and it would seem, that upon the maxim *Cessante ratione legis cessat ipsa lex*, this rule limiting the effect of a judgment upon demurrer would also cease, if it ever existed. The very object of the liberal rules for the allowance of amendments was to shorten litigation, and diminish law suits, but they could not have that effect if the contention of counsel is sound. We respectfully insist that whatever the rule might have been heretofore, at this time, a judgment on a demurrer, going to the merits, is as conclusive as a judgment on a plea.

These propositions are undisputed and indisputable:

1st. That the proceeding in the State court was one involving the title to the identical property, the title to which is here involved, and that it was between the same parties.

2d. That whatever title to such property appellee had at the commencement of this suit he had at the commencement of the action in the State court, and that his rights at the latter date were no greater than, nor different from, his rights at the former.

3d. That in suits at law or in equity involving title to property, the statute of limitations, operating to transfer title, can be set up by special plea, or may be availed of under the plea of the general issue, and in a court of equity may be set up by demurrer.

The contention of appellee is, that while a judgment based upon such defense may be conclusive, if it is founded on a

plea, it is not, if founded upon a demurrer. But appellee gives no reason for any such distinction and can not give any, for no such reason exists. Suppose, for instance, appellee had, on the theory that the stock was fully paid for, brought an action of detinue for its recovery, and appellant, to that action, had pleaded specially that the title to same was in him, by reason of the fact, that since 1875 he had been in the continuous possession and control of the same claiming it as his own, and adversely to appellee ; and upon that plea issue had been taken and judgment for defendant. Would any one for a moment contend, that appellee could maintain another action for the recovery of that property, based upon any title which he had at that time? We think not. Would the effect be altered if he had replied to the plea by setting up that the property was held as a pledge, and therefore the statute of limitations could not apply, and, upon a demurrer being sustained to such replication, had permitted judgment to go for defendant? We think clearly not; and we do not believe that counsel for appellee would contend, that the judgment in either of the supposed cases would not be a bar, or that the effect of the bar could be avoided in another suit, by averring in the declaration, facts, which, if averred in the replication, would have defeated the demurrer. Now there can be no difference in principle between the effect of a judgment in the supposed case and the effect of a judgment in the case at bar. In the first of the supposed cases the judgment might have been defeated by filing a special replication, showing, that the statute of limitations was not a bar in the particular case ; in the second, by meeting the demurrer, by an amendment of the special replication removing the objections. In the case at bar, it might have been defeated by amending the bill so as to meet the objections ; and this amendment was necessary whether the defense was made by the answer, by plea or by demurrer, because, under the chancery practice in Alabama, no replications are ever filed ; facts going to avoid defenses made by the defendant must be brought in by an amend-

ment to the bill, and those traversing are not required to be pleaded.

Code of 1886, § 3444.
Forest v. Robinson, 2 Ala. on p. 216.
Lanier v. Hill, 30 Ala. 111.
Adams v. Phillips, 75 Ala. 461.

This view of the law, contended for by us, is the view so emphatically expressed by this court in *Bissell v. Spring Valley Township*, cited in our first brief.

But there is really no foundation for the assertion that the Chancellor decided the case against appellee on the demurrer; on the contrary, it appears clearly, that he did not, both from his opinion which was a part of the decree and from that decree itself. In that decree he recites that the cause was submitted on pleadings and testimony, and then declares, "and on consideration it is ordered, adjudged and "decreed that complainant is not entitled to relief, and that "this bill of complaint be and the same is hereby dismissed "out of this court." On consideration of what? Of course of the "pleadings and testimony." When we come to examine the opinion, which shows what the chancellor did consider, we find that he did not consider the demurrers at all. After declaring the law to be, that the statute of limitations applied to such a case, he states clearly how he goes about determining whether in the case before him the defense was established, and finds expressly that it was; not because of defects in the pleading, but because the proof showed appellant had held the stock adversely for more than six years prior to the commencement of the suit and failed to show any recognition by him of appellee's right to the same within that time. This point is fully argued in our former brief on page 86 *et seq.*, and we deem it wholly useless to repeat that argument. On page 18 of the brief for appellee it is adroitly argued that as the chancellor held the statute of limitations a bar to relief and as that relief was set up by a demurrer, therefore the case was

decided on the demurrer. The counsel forgets to state that the defense was also set up in the answer and that the conclusion of the chancellor was reached upon an examination of the testimony and no reference whatever was made by him to the demurrer.

FOURTH.

It is urged by appellee in the next place that the defense of *res judicata* having been set up in the plea and exceptions having been sustained to that plea, the matter could not be set up in the answer as a bar to the suit without special permission of the court and that no such permission being shown, this court can not consider that defense as made by the answer. The defense however is set up *in extenso* in the answer in section 19. See Record, p. 62–5, and at the conclusion of the section we find the following :

"This answer is filed in bar of the complainant's bill as "well as in aid of the plea filed by this defendant in this "cause on to-wit, the 1st day of November, 1886, which said "plea is here reiterated, and is here referred to as a part "hereof and the benefit thereof claimed without being in-"serted herein at length."

The former adjudication, as a bar, could hardly have been more clearly set up than it is in the answer. The judgment of the court did not limit appellant to filing an answer in aid of the plea but gave him thirty days within which to file a further answer. That answer was filed on the 11th day of April, 1887, setting up as we have shown, distinctly, the same former adjudication as a bar to relief. There was no exception to that answer, or to any part of it, but on the contrary, a general replication was filed to it on the 16th day of April, and, upon the issues thus made, the cause was tried in the court below. If appellant had set up without leave of court this defense, exception should have been taken to it. Not having objected to the manner of making the defense, but on the contrary, having taken issue on the

matters thus set up, it is too late now to say that it was not properly presented.

Rules in Equity No. 61.
Story's Eq. Plead., § 867.
1 Daniel Chan. Prac., § 884.

FIFTH.

Before proceeding to reply to the points made by counsel for appellee in the IV subdivision of his brief, it is well to refer to an erroneous assumption which runs through all of his argument, and upon which all of its strength depends. He argues as if a dismissal of a bill involving the title to property upon the ground that the title was in defendant was a dismissal for defective pleading. That is not the case, and we care not whether the dismissal is on plea or demurrer. Let it be upon demurrer, the effect of the demurrer is the same as an allegation that the property is in defendant. By his demurrer, defendant says, not that plaintiff should allege some facts taking the case without the statute, but that upon the facts which he declares to be the true fact the title is not in himself but in the defendant. It is true that by amending his bill and averring facts that take the case without the operation of the statute he could defeat the demurrer. So he could also do away with the effects of a plea setting up the same defense by amending his bill in the same manner. The truth is, this attempt to draw a distinction between the effect of a judgment where the defense is made by demurrer, and the effect in cases in which it is made by a plea is illogical and finds no support in reason or authority. We would like to know upon what philosophy he would base such a distinction, a demurrer expressly based upon the failure to allege some specified fact would be for defective pleading, but a judgment on that, would, if the fact was necessary to a recovery, be final. It is only in case of demurrers to matters of form, or those which set up a failure to allege some fact which goes merely

to plaintiff's right to maintain the particular suit, that judgments thereon are not final. Judgment on demurrers which go to the right of plaintiff to maintain any suit, which go to his title to the thing involved, must, we insist, have all the force and effect of a judgment upon a plea setting up the same defense. Counsel admits a judgment upon such a plea would be conclusive of the title. See Brief, p. 34. There can in reason be no distinction between them. But the argument of counsel is remarkable for inaccuracy in the statement of matters of fact as well as matters of law. He declares that evidence of a recognition of appellee's title was immaterial to any issue presented by the pleadings in the State court. This is not correct. We have shown in our former argument, p. 82–3, and here again refer to it that in both the answer to the original and in that to the amended bill, appellant plead, not by demurrer but by answer, that for more than six years prior to the filing of that bill he had been in possession of the stock, claiming it adversely to appellee. This defense is distinctly set up in each of these answers. Record, pp. 17, 24-5. Now, then, what were the issues made by these answers, for by the very rule of court, cited by appellee on page 16 of his brief, the demurrers being incorporated in the answer, the cause, when submitted, was heard not only upon the issues made by demurrer but upon those made by the answer proper. The rule of the State Chancery court on this point is imperative. Then, was evidence, which tended to show, that appellant had not been in adverse possession of the stock, claiming the same as his own, more than six years prior to the commencement of that suit, relevant to any issue of fact made by the pleadings? If it was, it is clear, that evidence, which showed that he had recognized the ownership of appellee within that time, that he held the stock as pledgee, not adversely, but in subordination to the title of appellant, was not only relevant, but tended directly to overthrow the defense of adverse holding. We have seen that the answers directly set up this defense by suitable averments of facts, and we

have further seen, that, under the rule quoted, the case was submitted not only on issues of law but on issues of fact. Now, we assert, that under the rules of practice prevailing in Alabama, appellee in legal effect, traversed these special allegations of defense, denied, that appellant had been in possession of the stock, claiming it adversely to himself, as fully as he would have done, had he filed a special replication to the answer, specifically denying such adverse possession and claim of title, and any evidence, which would have been relevant to the issues made in case such special replication had been filed, was relevant to the issues made by the pleadings in the State court. As we said above, no special or general replication is ever required in Alabama. Then how are the issues made? As said by the Supreme Court of the State in Forrest v. Robinson, Ex'r, cited, *supra*, in referring to the statute abolishing replications, "The effect of this provision must be, that the statute silently makes up an issue upon the facts alleged in an answer." The same principle is again declared in Lanier v. Hill also cited *supra*, where, it was expressly held, that, there was no error in refusing to allow an amendment to a bill, because the matter proposed, "merely involved a nega-"tion of defensive averments brought forward in the an-"swer. Consequently it was neither necessary nor proper to "amend the bill by the proposed addition to it."

See also Vaughn v. Smith, 78 Ala. 201.

The appellant asserted, as a matter of defense in his answer, that he had been in the adverse possession of this stock for more than six years. Appellee traversed this plea, and upon this issue a trial was had. Will any one be so reckless of his reputation as a lawyer, as to assert, that evidence tending to show that, within the time necessary to constitute the bar, appellant had recognized and admitted that he held the stock as a pledge, was not directly relevant to the issues so made? Why, it is clear that, if the evidence was sufficient to establish the fact, it would defeat the defense; if it would, evidence tending to establish it was clearly relevant.

This is a conclusive answer to the argument and assertion of counsel that all the evidence of appellee and his father which, he says, showed the continuation of the trust relationship after 1875, and which was the same in the State as in the Federal court, was irrelevant, and should not have been noticed. These propositions and conclusions may, we think, be safely asserted to be beyond dispute.

1st. That the defense of the statute of limitations might have been made, and was made in the case in the State court, both by plea and demurrer.

2nd. That under the Alabama practice an issue was made both on the defense as a matter of fact and as a matter of law.

3rd. That all evidence tending to show that appellant had not been claiming the stock adversely for six years prior to the commencement of the suit, was relevant to the issue of fact thus made.

4th. That under the rules of practice, governing courts of equity in Alabama, the demurrers being incorporated in the answer, and the cause being ready for submission on the facts, as well as the law, the cause was required to be, and was submitted on all the issues made by the pleading, both of law and fact, including the issue of fact on the plea of adverse possession.

5th. That the court to which the cause was submitted had it before him on all these issues, and was required by no statute or rule of practice to determine any particular one of the issues, but was left free to base his judgment upon any one of them which he might consider conclusive of the case.

6th. That having the right to dispose of the case on the issues of fact thus made, the court did, as shown by his opinion and decree, and as asserted by the Supreme Court, dispose of it on the issues of fact.

We say these propositions do not admit of dispute. The adroitness with which counsel for appellee seeks to force the conclusion that the Chancellor decided the case on the

demurrer, is both instructive and amusing, but unfortunately for him, he himself, calls the attention of this court to the rule, which required expressly that the cause should be submitted on all the issues, both of law and of fact, and which does not limit the Chancellor's right to base his conclusion upon any particular issue. The Chancellor discusses the issues of fact, and only the issues of fact, and finds, as a conclusion of fact, that appellant had held the stock adversely to appellee for more than six years, and that, therefore, the title to it was in him, and, upon this finding, renders a judgment dismissing appellee's bill. But for some strange reason, not visible to us, the counsel for the appellee and the judge who tried the cause below, seem to think that, although the cause was submitted on issues of both law and fact, and although the court said he based his decision on the conclusions, which he reached on the issues of fact, yet, there was some rule of law, or some controlling power, which required that the decision should be attributed to the Chancellor's conclusion on the issues of law. The fact is, no one can find that the Chancellor ever found that the allegations of appellee's bill were insufficient, that has been found by his counsel since he has sought to have another trial of the issues involved in the trial in the State court.

In speaking of the rule requiring the cause to be submitted on all the issues, counsel speak of appellee being "forced to trial on all issues presented by defendant in his multifarious mode of pleading."

This assertion is scarcely correct. If counsel had intended to be rigidly correct, he would have called this court's attention to another rule of practice, which authorized him at any time he desired, even in vacation, to have his cause submitted on the demurrers alone, and to obtain a ruling upon them.

Code of 1886, p. 824, Rule 75.

It would have been a little more accurate, perhaps, if counsel had said, as the demurrer was first filed in August, 1884, and the cause was not heard until April, 1885, a full

term of the court intervening—that not wishing to avail himself of the right given him to have the demurrers passed upon whenever he desired, prior to April, 1885, he had voluntarily submitted the cause "on all the issues presented by defendant in his multifarious mode of pleading."

Record, pp. 165, 167, 170.

The appellee submitted his cause in the State court on all the issues, those of fact as well as those of law. A decree was rendered in the cause, and from the opinion of the court which is a part and parcel of the same paper containing the decree, it is seen that "the prevailing ground of defense" was, that it was shown by the evidence that the title to the property involved was in appellant. To give the decree the construction contended for by us, we do not have to ascribe to the court rendering it "an intent to decree beyond the issue." We only ask that the appellee having voluntarily submitted his cause upon two issues, one of law and the other of fact, and the court doing that which it had a right to do, deciding it upon the issue of fact, he shall not be permitted now to assert that it was decided on the issue of law for the purpose of obtaining some supposed advantage. To construe the decree as one rendered on a demurrer, would be to declare, that under a submission, such as the one here shown, it was the duty of the court to decide it upon demurrer; a position utterly unfounded. But even if it had been the duty of the court to pass upon the demurrer before it could determine the issues of fact, it, as we have seen, did not do so, but decided it on the latter issue. In such a case, it being a court of general and superior jurisdiction, having jurisdiction of the cause, its action, at most, would be only error, and its judgment would be as conclusive on all the parties until reversed by some appellate tribunal as it would be if the issue of fact had been the only issue.

Goodman v. Winter, 64 Ala. 410.

We repeat everything about the opinion and the decree shows that it was on the issues of fact that it was rendered.

The decree itself is one in the form used by courts of equity only when the decree of dismissal is based on such issues; decrees upon demurrer universally contain a judgment upon their sufficiency, and then decree the effect that the finding shall have upon the cause; when the demurrers are well taken, the courts adjudge that they be sustained; if the defect is amendable, leave to amend is given, and upon failure to amend the decree directs dismissal of the bill; if the defect is not amendable the bill is dismissed without leave to amend. Here too, if the lower court errs, and gives to the decree a wider effect than it should have, the only place where the error can be corrected and the effect confined within its proper limits is in the appellate tribunal, which by law is given the power to review the rulings of such lower court and also to correct any wrong which it may have done the party decreed against, either in the extent or form of the decree.

Counsel for appellant asserts, in his brief, that the Supreme Court of Alabama is one of appellate powers only. It is an appellate court it is true, and has very little original jurisdiction, but if counsel means by that assertion to convey the idea that such court has only the power to reverse or affirm the judgment of the court, he is as inaccurate in that statement as we have shown that he is in many others. We have shown by the many citations of authorities in our first brief, that the Supreme Court has, from time immemorial, held, that, when a bill is dismissed absolutely by the lower court, either for defective pleading or because of variance between the *allegata and probata*, or for any other cause that was not absolutely conclusive of complainant's rights, and the cause was brought before it for review, it is its duty to examine the whole record, and if upon such examination it determines complainant would be entitled to relief upon the same testimony in another suit, then it must either reverse the decree of the lower court and remand the cause, with instructions to dismiss the bill without prejudice, or, must itself, render the decree so dismissing it. We showed further that it had also always held that where the decree

was upon demurrer, and it was rendered in vacation, as it was in this case, it had no discretion, if the defect could be cured by amendment, but was required to reverse and remand in order that an opportunity for amendment might be allowed. So we see that among the powers of that court was the power to correct the error of the chancellor if he committed any in disposing of appellee's case on the issues of fact, when he should have disposed of it on issues of law. These decisions of the Supreme Court are based upon an express statutory requirement, section 3658 of the Code of 1876, which was at the time this case was tried in the State court, and had been for many years, the law of this State, declaring:

"The Supreme Court may, upon the reversal of any judg-"ment or decree, remand the same for further proceedings, "or render such judgment or decree as the court below "should have rendered when the record enables them to do so."

We then insist that the Supreme Court had jurisdiction to determine whether the appellee had any cause of action against appellant, and that they had to determine this, not upon the pleadings, but upon the evidence; that they exercised this jurisdiction and did determine that he had none, and they did this by affirming the decree of the court below. They were bound to examine that evidence and reach a conclusion from it, and if that conclusion was, that appellee had a cause of action but failed merely because of defective pleading, they were bound to reverse or modify the decree of the lower court. By affirming the decree, they, in legal effect, adjudged that appellee had no cause of action on the facts as fully as they would have done by inserting in the judgment of affirmance an express adjudication of that right —unless they so found it would have been error to affirm. We refer on this point to the following additional authorities.

Kingsbury v. Milner, 69 Ala. 502.
Bishop v. Wood, 59 Ala. 253.
Conner v. Smith, 74 Ala. 115.

Stoudemire v. DeBardelaben, 72 Ala. 300.
Shackelford v. Bankhead, *1b.* 476.

Then the very fact that the chancellor dismissed the bill in vacation without allowing an opportunity to amend, would, of itself, create the presumption that he dismissed it on the issues of fact and not on those of law. But, had he dismissed it on the latter, we have seen it would have been mere error, and on a collateral attack the judgment would have the same force and effect it would have if the opportunity to amend had been allowed and appellee had refused to avail himself of it.

Counsel for appellee says that the case of Bissell v. Spring Valley Township, 124 U. S., was correctly decided but that the principle there settled has no bearing upon the question here involved. He says by demurring to the plea and refusing to plead over, when the demurrers were overruled, plaintiff confessed that the plea could not be answered by any matter of fact. It seems from his argument that his idea is, that judgments based on rulings on demurrers only operate as estoppels when they are overruled, and it would seem that they would then so operate only against the demurrant. By failing to plead over, which is in the nature of an amendment to pleading, when his demurrers were overruled, plaintiff admitted that the facts set up in the plea were true; but by risking his case upon the theory that the statute of limitations did not bar the right to redeem a pledge, and failing to amend, so as to meet the objection raised by the demurrer, appellee admitted nothing and ran no risk. That is the argument, but we must confess that if it is the law, the law is strangely inconsistent and illogical. If the principle contended for was true in ordinary cases, it ought not to be applicable to a case like the one under discussion. Here the complainant's attention was called by the demurrers to the claim of defendant that his cause of action was one upon which the statute of limitations of six years did operate, he had the right to have those demurrers separately passed upon, failed to avoid himself of the right,

but submitted the case upon all the issues, those raised by the answer as well as those raised by the demurrers, relying upon his theory that the statute of limitations had no application, just as in failing to rely to the plea in the Bissell case, which set up that the county clerk had not signed the bonds, the plaintiff relied upon his theory of the law that such signature was not required. In the one case it is gravely argued that the plaintiff admitted by thus relying on his theory of the law that he could not meet the objection to his recovery thus raised by traversing the facts, or by the allegation of additional facts in avoidance of it, but in the other he admitted nothing. Is this the law? Is it that logic for which counsel seems to have so great an admiration? We think not. We think both the law and the logic is found in that forcible and pretty sentence of Mr. Justice Field in the case referred to, which we here repeat:

"Courts are not established to determine what the law "might be upon possible facts; and when their jurisdiction "is invoked parties will be presumed to represent in their "pleadings the actual and not supposable facts touching the "matters in controversy."

When appellee submitted his case upon the allegations contained in his bill, declined to meet the defense of the statute of limitations by averring facts which would show it did not apply, upon the authority of what is said by Judge Field, it must be presumed he did it because his bill represented the "actual facts touching the matter in controversy," namely, that his right to the stock grew out of the contract of 1871, and that there were no recognitions of that right, except such as the bill averred, and upon the principle of logic, applied by counsel so forcibly in his construction of the effect of the failure to reply to the plea in the Bissell case, it must be further held that appellee by standing by his theory of the law in effect said: "If the demurrer is good in law, I confess it cannot be answered by *any matter of fact.*" We have quoted the identical language of counsel, italics and all, except that we have written the word "demurrer" where he had "plea." We have done this because

we will confess the manner of stating the proposition struck us with a great deal of force, and we know that we cannot improve on it. The trouble with counsel is, that when he comes to make the attempt to show that the principle does not apply to the case at bar he leaves his logic and returns to assertion. There is one thing however that the judgment in this case in the State court did settle according to the admission of counsel, and that was, that appellee was not entitled to redeem from the pledge of 1871, and by so deciding the State court had held that the *original title* set up by appellee had been divested out of him, thus we see the original title was involved in that suit; and yet, we find that the Circuit Court holds, that not even that question was *res judicata*, for its decree permits appellee to redeem even from that pledge. It would not do to decree that the stock should be taken away from appellant and leave appellee in his debt for the purchase-money; it is true it had been adjudged by the State courts, Chancery and Supreme, that appellee had no right to redeem as to that debt, but in the opinion of the court and his counsel he ought to have the stock, and no such thing as the solemn adjudication of even a State Supreme Court should stand in the way of his getting it. This we submit is the logic upon which the decision below rested, if we go no further than give to the judgment of the State court the effect which it is admitted it should have even by the court below and the counsel for appellee.

Decree on Plea, Record, p. 44.

If we were to undertake to correct all the inacuracies of statement, both of law and fact, contained in the brief to which we are replying, this brief would be protracted beyond all reason. We cannot do it; we can only call the attention of the court to some of the most glaring and ask that none be accepted except after a critical examination. On page 41 of the brief, in enumerating the reasons why there was no cause of action in the first bill, counsel, among other things, says, 1st, the allegations showed only one

pledge for one debt, while the proof showed several distinct pledges for other debts and to other persons; 2d, The proof also showed Morris had not been paid at the time the first bill was filed, therefore he had a right to retain the stock.

The only debts shown by the proof referred to was the debt to appellant for the balance due on the stock, which was certainly alleged in the bill, and two debts due to the firm of which appellant was a member. by two different firms of which appellee had been a member. Now, the position of the counsel is this, that the amended bill in the State court did not aver these debts, or that the stock was pledged for their security, and as the evidence showed that they did exist and that the pledge was for their security also, there was such a variance between the *allegata* and *probata* that for that reason no cause of action was shown by the first bill. The position is a remarkable one, it amounts simply to this, a party goes into court setting out his cause of action, he introduces his proof, no objection is interposed because of its variance from the allegations, and he obtains a judgment upon the sufficiency of that proof and it is against him, then he brings another suit and when that judgment is set up as a bar, he has only to reply, "It is true this issue was decided in that case and upon its merits, but it might have been decided against me upon the variance between the allegation and the proof, therefore it is not a bar." We suppose, however, if the judgment had been against defendant it would have been a bar against his litigating the matter again, for we would like to know how he would go about getting rid of it, but it works no estoppel against plaintiff—he is safe, he may win, but he cannot possibly lose. The argument furnishes its own answer. But it is not a fact that there was any variance between the allegation and proof in this respect in the proceedings in the State court. By reference to the amended bill in that cause (Record, p. 166–7), it will be seen that it is distinctly averred that the stock stood pledged not only for the balance of the purchase-money but for all moneys which ap-

pellee might become liable to pay appellant, or the firm of which appellant was a member, and it further avers that he, appellee, did become and was then liable for several of such debts, and the bill contains an offer to pay them. Yet it is said that proof of debts to appellant's firm for which appellee was liable was such a variance as would have authorized the dismissal of the bill on that account. This position is only less remarkable than the one above stated.

The second reason why the first bill coutained no cause of action amounts to this, that a bill to redeem must be dismissed if the proof shows that any part of the debt for which the property stands as a security was unpaid at the time the bill was filed, although it contains an averment that nothing was due and offers, if it should be ascertained however, that complainant is mistaken in that averment, to pay what is ascertained to be due as this bill did. There is no use for argument, to show the entire folly of this position.

Cain v. Girmon, 36 Ala. 168.
McGuire v. VanPelt, 55 Ala. 344.
Field v. Helms, 70 Ala. 460.

The very position here averred is fully met and answered by counsel himself in his brief filed in the State Court found in the record of this case, page 324.

We reiterate what we said on page 108 of our former brief that even if there had been no opinion by the Chancellor, if the decree of dismissal had been in the same form, the presumption would have been that it was based upon those issues which went to the merits, not to those which only went to maintainance of the particular suit, the dismissal being absolute, which it is presumed would not have been the case, if the decree was based upon the latter issues. And this proposition, notwithstanding counsel may think it, " at war with everything that has been held by the courts, has been frequently held by those courts that stand the highest, including this court."

House v. Mullen, 22 Wall. 42, 46-7.

Before closing the argument on this branch of the case, we desire to repeat that the question before the State court was the title to the stock there and here involved. In answer to the bill filed in that court appellant distinctly denied that appellee had ever been the owner of the stock and then as a further defense set up by answer and demurrer that if he had ever owned it, the title thereto had been divested out of him, appellee, and had been invested in him, appellant. Ownership of the stock was the issue in that case, and may be said to have been the only issue. It was the question there decided, and it is the question which the Circuit Court here decided, but adversely to the decision of the State court. If such a thing is to be permitted, it may well be asked how are titles to be settled?

SIXTH.

When counsel comes to discuss this case on its merits he admits by the fury with which he attacks the decision of the Supreme Court that he recognizes those decisions as defeating his right of recovery, even if there was no former adjudication in his way. In arguing the question of the application of the statute of limitations to holdings under such contracts as the one between appellant and appellee on page 72 of his brief, he says:

"In this court, and on such questions we are not bound "to take as our measure of right the yard stick of the State "court, and especially so if its shortage is such as to shock "common sense." And we will show that decisions sustain-"ing any such ideas are wanting in every element which "commands respect."

Very strong language and very severe to be used in speaking of the highest tribunal of one's State.

But is it true that this court ought not to measure appellee's right by the particular yard stick? The contract was made in Alabama by two citizens of Alabama, and it would be a reasonable presumption to infer that they made it with reference to the laws of Alabama. This seems to us to be in strict accord with that "common sense" to which counsel so often appeals.

If that law is not the one by which the rights of the parties are to be determined, let us see what the result would be in the numerous similar cases that are constantly arising and which will grow more numerous as the State develops, and the amount of capital invested in corporate enterprises increases. One thing is certain, the rule established by the State court will be the measure by which such rights will be determined in all cases tried in those courts. Then is this point to hold, that a man's property rights in Alabama are to be dependent upon the particular tribunal in which his case is tried, State or Federal. A is indebted to B and pledges stock, transferring it to him on the books of the corporation as a security for the payment of the debt; six years have passed since the maturity of the debt, and B proposes to sell the stock to C, who knows how he holds it; but C is advised that under the laws of Alabama B has the absolute title to the stock, and so long as A remains a citizen of the State he cannot disturb his title or possession, but if he become a citizen of another State and bring suit in the Federal court he might redeem it and compel him to account for the dividends received in the mean time. Can the idea of transactions of this character, being governed in the same State by two such antagonistic theories of the law be tolerated for a moment? To our minds the contention that any court should so hold "is such as to shock common sense."

If a decision of a State court declaring that one who holds for six years under such a contract, without the recognition of the rights of the pledgor or mortgagor, we care not what he is, thereby becomes invested with the absolute title to the property, does not declare a rule of property it would be hard to suppose a case that did. But even if it did not, it does declare a rule for the construction of contracts made in Alabama, and it would be strange indeed if it should be permitted for parties to change the construction of a contract by changing their domicile. If, under the laws of Alabama, the contract when made was a mor[illegible]e, we do not think any court will hold that it can be converted into a strict pledge by one of the

parties moving into another State, or, if under tne laws of Alabama, even though a strict pledge, the title of the pledgee became absolute by holding the thing pledged for six years after the maturity of the debt, we do not see how it could be held, that if the pledgee moved into another State, and that, too, after the bar was complete, the title of the pledgee would be re-invested. It would be strange if such a condition of the law could be upheld. We are satisfied this court will not so hold, because, it has declared too often, and too emphatically, to the contrary, for, as it so well says in Brine vs. Insurance Co., 96 U. S., on page 635 :

"To do so is at once to introduce into the jurisprudence of "the State * the discordant elements of a substantial right "which is protected in one set of courts and denied in the "other, with no superior to decide which is right."

And the same doctrine is fully recognized in Burgess vs. Seligman, 107 U. S., cited by appellee, on page 33–4, and also in the following cases :

Walker v. Walker, 9 Wall, 743, 754–5.
Ohio v. Frank, 103 U. S., 697.
Flash v. Conn., 109 U. S. 371, 378.
Bendey v. Townsend, Ib. 665, 668.

The Supreme Court of Alabama when this case was before them decided very clearly these points :

1st. That contracts, like the one here under consideration were mortgages.

2nd. Whether mortgages or pledges, holding possession for six years without recognition of the pledgor's or mortgagor's title, divested title out of him ; and,

3rd. That the statute of limitations commenced running from the maturity of the debt secured.

Notwithstanding what counsel says, the case of Humphries vs. Terrell, 1 Ala. 650, which has been the unquestioned law of Alabama since 1840, lays down the same rules, stated under the 2nd and 3rd heads above ; and in that case the court treated the contract as creating a pledge and decided it upon the theory that it was a pledge. But counsel insists that the

decision was right, but the court was wrong in holding the contract in that case a pledge, that it was a mortgage, and therefore, the statute of limitations did apply. We are at a loss to understand the process by which he arrives at his conclusion, unless it is upon the idea that a contract which would create a mortgage of corporeal personal property, creates a pledge where the subject matter is stock. In that case Humphries procured Terrell to buy in for him certain slaves under an agreement that the latter was to take possession of them, and hold them until they were paid for, here, according to appellees theory of the case, he made the same contract with appellant about the stock. In this case he insists it was a pledge, but in the case in 1 Ala.., because the court adopted the same theory of the law he here contends for, he says that, and other decisions like it, "are wanting in every element which commands respect." Such expressions as those are not argument, and cannot influence the judicial mind. They only indicate the weakness of his case, and do not call for a reply. The Supreme Courts of Alabama and Pennsylvania, which have equally excited the indignation of counsel, need no defense at our hands. Then, if this court is to pay any regard to the long settled law of Alabama, the law with reference to which it must be presumed two citizens of the State making a contract within its borders, to be executed within its borders, entered into their agreement, it follows that the statute of limitation does divest title in cases of pledges as well as in other cases. We have fully argued the general principles of law on these points as generally held by the courts, and do not care to repeat that argument, we have shown that the tendency of legislation and decisions has been for years towards shortening the time in which parties should be permitted to litigate their rights, and that in no class of cases is this tendency more expressed, or mere needed than where the subject matter is a thing of such uncertain and fluctuating value as stock in corporations.

When he comes to discuss the evidence upon which he claims the court below was justified in finding that the right

of appellee to redeem was not barred, it is remarkable; the quotations made from it by counsel as the parts establishing that view of the case, are taken nearly altogether from the testimony which was before the State courts, and which was passed upon by them. The few portions of the evidence taken in this case referred to by him, are mere repetitions by the same witnesses of what they had testified before the State court, they do not in any sense change the legal effect of the testimony before the State court. Counsel says that it is expressly shown that the stock stood as a pledge for the debts due by the firm of Gilmer & Donaldson, and Gilmer & Co. Even if that was conceded, we do not see how it would help appellee if the law of Alabama is to govern this case. The first firm ceased to exist in 1876, and the claim against it matured not later than the fall of that year. The second ceased to do business with appellants firm March 4th, 1879, and the balance due by them, on overdraft. became at once due and payable. The last debt matured more than seven years before this suit was commenced

Counsel makes extracts from the testimony of appellant in the State court and claims that he testified therein that the stock stood as a security for advances to Gilmer & Co. We insist that no such inference can be fairly drawn from that testimony. And let us here repeat, that it is to be noticed, that he undertakes to draw this inference from the very testimony which was before the Supreme Court of the State and of which that court said, through its Chief Justice:

"I have read and scrutinized the testimony in this record "with very great and painstaking care. I find not a sem- "blance of proof that at any time after the spring of 1875, "any credit was extended to F. M. Gilmer, to J. N. Gilmer, "or to any of the firms with which the latter was connected, "on the faith of the stock in the Elyton Land Company, as a "security."

By reference to the testimony quoted page 64 of the brief, it will be seen that from that there can be no inference drawn except that the stock stood as a security for debts due by F. M. Gilmer, Gilmer, Browder & Co., and Gilmer &

Donaldson, while on the page of transcript 211, immediately following the page from which this extract is copied, it will be seen that appellant distinctly testified that the agreement to advance to Gilmer & Co. was made upon other security and without reference to or mention of this stock. This testimony is strongly corroborated by the action of appellee when pressed for the payment of the balance due by that firm argued in full in our former brief.

In the extract found on page 66 of the brief of appellee, it will be seen that in framing a question as to the time when the agreement that the stock should stand as a security for the debts of F. M. Gilmer, and the two firms mentioned above, was entered into, counsel assumed that appellant had testified that the firm of Gilmer & Co. was included in the agreement, appellant answered the question as to the time, but took no notice of the fact that counsel had assumed that he had testified to, which in fact he had not stated.

It is hardly necessary to argue that the assumption by counsel in asking a question, that a witness had testified to a fact—a fact which merely leads to the question to be asked—can not be construed into an admission by the witness that he had done so. It was an ingenious attempt to to entrap a witness, but one which can hardly meet the approval of courts so as to make it successful as evidence. The only legitimate inference to be drawn from the extracts from the testimony set out on pages 68–9 of the brief is, that while appellant considered the stock as his own, there was no time up to 1881, that he would not have given it up upon the payment to him of the total amount due him by F. M. Gilmer and appellee and appellee's several firms. This is most likely as he could have replaced it for a much less sum than they owed him—it would have been a fine sale. The fact is, although counsel on page 89 of his brief assumes that the stock was a security for debts amounting to only about $700.00, there never was a time after 1876 and up to 1881 when there was not due on the unpaid purchase-money and on the debts due by the firms of Gilmer, Browder & Co., and Gilmer & Donaldson, an amount exceeding

six thousand dollars, nor was there ever a time within that period when the stock was worth the amount of such indebtedness.

There are many other glaring inaccuries in statement of facts and law to which we would like to refer, statements so inaccurate as to make it impossible for us to comprehend how they could have been made, but we can not in justice to the court impose further upon its time. Any examination of the testimony will enable the court to discover them.

In commenting upon the case of Twin Lick Oil Company v. Marbury, 91 U. S. 588, counsel highly approves of the decision, and says, that in such cases, "An election is nec- "essary, one road or the other must be taken; and nothing "but common justice requires that one shall not await sub- "sequent events and then make a choice *according to the turn "of fortune.*"—italics ours. Again he says, Brief, p. 102, "Would it not be monstrous on the other hand—would it not "hold out luring bait to weak persons—to say to pledgees. "If the stock goes down, you can be honest and return the "thing, but if it goes up, return the value at the date of an "alleged conversion."

And again he asks does "honesty oppress any man?" This is all applicable in counsel's opinion to appellant alone. Appellee is to be governed by no such rules. He can wait until his debt is barred by the statute of limitations and then wait a further period of fourteen years. If the stock continues to be worth less than his debt he cannot be made to pay the debt; if the term of "fourteen years" should make it worth more, he may at any time within that time redeem the stock and call on the creditor to account for dividends. In conclusion we ask, "would it not be monstrous, would it not hold out a luring bait to weak persons—to say"—to pledgors "wait until your debt is barred by the statute of limitations without offering to pay it or to redeem the pledge, for if at any time within the succeeding fourteen years the stock is worth more than the debt you can be honest and pay the debt, or let the dividends do it, and re-

deem the stock, if it is not worth so much you can let the pledgee keep the stock and laugh in his face if he should be so silly as to ask you to pay the difference." He also asks "Does honesty oppress any one?" And we further ask if it is not honesty for a pledgor to be required to ask to redeem the thing pledged while the obligations are mutual, while the debt can be collected out of him as well as the pledge redeemed from the pledgee? It would seem to be honest, that when one man is not bound to perform an agreement the other should also be released. It is upon this idea of what is honest and right between man and man that the decisions of the Supreme Court of Alabama, New York and Pennsylvania are founded, and the idea is one that it does seem should commend itself to all except such as hope to gain an advantage by awaiting "subsequent events and then make choice according to the turn of fortune" whether they will pay their honest debts as they should be paid or get rid of them by pleading the statute of limitations.

Respectfully submitted,

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